United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

689

598

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,188

AYAKO HONDA, *et al.*,
THOMAS H. CAROLAN and PHILIP W. AMRAM,
Appellants

v.

RAMSEY CLARK,
Attorney General of the United States

No. 22,193

AYAKO HONDA, *et al.*

v.

RAMSEY CLARK,
Attorney General of the United States,
Appellant.

CONSOLIDATED APPEALS

APPENDIX

Gilbert Hahn, Jr., Esq.
Bardyl R. Tirana, Esq.
Amram, Hahn & Sundlun
700 Colorado Building
Washington, D. C. 20005
Attorneys for Petitioners

THOMAS H. CAROLAN, ESQ.
and
PHILIP W. AMRAM, ESQ.
Petitioners pro se

Washington, D. C. THIEL PRESS 202 393-0625

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AYAKO HONDA, FT AL

v. Civil Action No. 1179-64

NICHOLAS De B. KATZENBACH

DOCKET ENTRIES

1964

May 19 - Complaint, appearance, Exhibit "A", filed.

May 19 - Summons copies (2) and copies (2) of Complaint issued ser. 5-20-64; U.S. Atty. ser. 5-20-64.

June 2 - Stipulation extending time to file transcript of administrative proceedings until September 15, 1964.

August 25 - Appearance Armand B. Du Bois, as attorney for defendant. filed.

August 26 - Transcript of record of proceedings in the office of alien property. filed.

September 4 - Answer of deft to complaint; c/m 9-4-64; appearance of Armand B. DuBois. filed.

September 4 - Calendared (AC/N) (N).

December 29 - Motion of deft to dismiss; P&A; affidavit, c/m 12/29/64; MC 12/29/64. filed.

December 29 - Motion of deft for joint hearing on motion of deft to dismiss in CA 1591-64 and 1630-64; c/m 12/29/64; MC 12/29/64. filed.

1965

January 8 - Opposition of pltfs to motion to dismiss; affidavits (4); c/s 1/8/65. filed.

January 12 - List of additional plaintiffs in this "class action". filed.

January 14 - Affidavit of Katsuma Mukaeda; c/m 1/14/65. filed.

March 2 - Called - Assistant Pretrial Examiner.

March 31 - Order dismissing complaint. (N) Jones J.

April 2 - Notice of appeal by pltf from order 3/31/65. Copy to John Douglas. $5.00 deposit by Silard. filed.

April 2 - Letter to Judge Jones dated 2/24/65 as per Judge Jones. filed.

April 2 - Order directing Clerk to transmit record to Court of Appeals forthwith. (filed in CA 1591-64) (N) Jones, J.

April 9 - Record on Appeal delivered to United States Court of Appeals; Deposit by John Silard - $.95.

April 9 - Receipt from United States Court of Appeals for original papers. filed.

April 13 - Opinion of USCA reversing judgment of USA. filed.

1967

June 1 - Certified copy of judgment of USCA pursuant to remand by the Supreme Court vacating opinion & judgment of USCA of 1/13/66 & remanding to USDC for further proceedings. (filed in C.A. 1630-64) filed.

June 8 - Appearance of Thomas H. Carolan and Philip W. Amram for 712 members of the class, names attached; N/AC. filed.

June 15 - Motion of pltfs and deft for entry of consent judgment; c/m 6-15. filed.

June 29 - Application of pltfs. counsel for fee; exhibit; c/m 6/29 filed.

June 30 - Petition of Thomas H. Carolan and Philip W. Amram for award of counsel fees; c/m 6/30/67; Exhibits (5); M.C. filed.

July 6 - Motion for entry of consent judgment heard and granted; petition for award of counsel fees to Thomas H. Carolan and Philip W. Amram heard and taken under advisement. (Rep: Patrine Brockmeyer) Jones, J.

July 6 - Consent Judgment and Decree for pltffs vs. deft. (See Consent Judgment and Decree for details) (N) Jones, J.

July 10 - Amended petition of Thomas H. Carolan and Philip W. Amram for award of counsel fees; c/m 7-7. filed.

July 17 - Memorandum in opposition to motion of attorneys Carolan and Amram for counsel fees; c/m 7-17-67. filed.

July 24 - Appearance of Gilbert Hahn, Jr. and Bardyl Rifat Tirana with petitioners Carolan and Amram. filed.

July 24 - Motion of Carolan and Amram for leave to file 2nd amended petition; exhibit A; P&A; c/m 7-22; M.C. filed.

July 24 - Reply memorandum of Carolan and Amram in support of application for attorney's fees; c/m 7-22. filed.

July 27 - Opposition of deft to motion of Carolan and Amram for leave to file 2nd amended petition; P&A; c/m 7-27. filed.

August 11 - Copy of a letter dated 7/21/67 to Mr. Atwood from John Silard re: notification to claimants of judgment entered 7/6/67 in this Court. (per Jones, J.) filed.

October 25 - Points and Authorities in support of application of Thomas B. Carolan and Philip W. Amram for attorneys' fees. filed.

October 25 - Memorandum. micro 10-26-67. Jones, J.

October 25 - Order, denying motion to file second amended petition for counsel fees. (N) micro 10-26-67. Jones J.

November 3 - Motion of defendant for enlargement of time to respond to Court's memorandum order; c/m 11/3/67. filed.

November 8 - Order extending time to object or respond to Court's memorandum order of October 25, 1967 to Nov. 27, 1967. (N) Jones, J.

November 22 - Copy of letter from John Silard to Mr. B. S. Atwood dated May 16, 1967 sent to Judge Jones. filed.

November 22 - Copy of letter from John Silard to B. S. Atwood dated June 8, 1967 sent to Judge Jones. filed.

November 22 - Letter and attached draft of letter to Honda claimants from Barlett S. Atwood to Judge Jones dated August 10, 1967. filed.

November 24 - Objections of claimants to consent judgment and request for modification. filed.

November 27 - Application of Yoshikaza Wilson Yamauchi for payment of claim exhibit. filed.

November 27 - Exceptions and objections of deft to memo of 10-25-67; c/m 11-27-67 M.C. filed.

November 28 - Return from USCA original record. original supplemental record containing transcripts, record containing original exhibits and original exhibits transmitted separately. filed.

November 29 - Objections of Yu Kato to consent judgment and decree and request for modifications; exhibits (4) M.C. filed.

December 1 - Objection of Kenichi Nakamura to certain paragraphs of consent judgment; Appearance of Mark Kiguchi. filed.

December 1 - Opposition of Kama Nakama and Sawano Okushima to judgment and decree; exhibits (3); c/m; appearance of Kashiwa and Kashiwa, 401 Trustco Bldg., Honolulu, Hawaii, 96813. filed.

December 1 - Opposition of certain petitioners to judgment and decree; exhibits (2); appearance Kashiwa & Kashiwa. filed.

December 4 - Opposition of Yoshio Maruyama, Mataichi Matsuura, Terito Matarchi, Urayo Akita, Kiyoshi Akita, Atsutaro Sasaki, Yukio Kondo, Seijin Nakamura and Agnes Asato to consent judgment and decree; exhibit A; appearance of Katsugo Miho. filed.

December 4 - Response of petitioners to Government's exceptions and objections; c/m 12-4. filed.

December 4 - Letter from attorney re objections of Kenichi Nakamura to consent judgment and decree; exhibit. filed.

December 5 - Memorandum of petitioners re: identification of counsel and division of fees. filed.

December 5 - Memorandum of petitioners with respect to exceptions or objections to the Court's opinion. filed.

December 7 - Motion of deft for enlargement of time to respond to opposition to consent judgment and decree; c/m 12-7-67; M.C. filed.

December 13 - Declaration of interpreter and certified translation of Bank of Tokyo, Ltd. worksheets. filed.

December 27 - Motion of pltffs. and deft. for entry of final judgment and decree; exhibits A & B & C; c/m 12/27/67 filed.

1968

January 4 - Comment of Thomas H. Carolan and Philip W. Amram on motion for entry of final judgment and decree; c/m 1-4-68. filed.

January 8 - Objection of Yoshitaro Murakami to consent order. filed.

January 16 - Appearance of Stuart H. Robeson for Kama Nakama and Sawano Okushima. (1828 Jefferson Place, 20036) filed.

January 22 - Order granting Motion of deft for extension of time to respond to objection to Order of July 6, 1967, to and including February 1, 1968. (N) Jones, J.

January 25 - Interrogatories to deft.; c/m 1-22 filed.

January 31 - Plaintiffs' response to objections to consent judgment; c/m 1-31; exhibits (2). filed.

February 1 - Opposition of defendants to motion of Kama Nakama and Sawano Okushima in opposition to certain provisions of judgment and decree; c/m 2/1/68. filed.

February 1 - Opposition of defendant to objection to consent judgment and decree by Yoshio Maruyama and eight others; c/m 2/1/68. filed.

February 1 - Opposition of deft. to motion and objections of Yoshitaro Murakami to consent judgment and decree; c/m 2/1/68. filed.

February 1 - Opposition of defendant to consent judgment and decree and request for payment by Kenichi Nakamura and Teruyo Nakamura; c/m 2/1/68. filed.

February 1 - Opposition of defendant to objection to consent judgment and decree and request for modifications by Muneyo Hayashi and eight others; c/m 2/1/68. filed.

February 1 - Opposition of defendant to "application for payment of claim" filed by Yoshikazu Wilson Yamuchi; c/m 2/1/68. filed.

February 1 - Opposition of defendant to objections to consent judgment and decree and request for modification by Yu Kato; c/m 2/1/68. filed.

February 1 - Opposition of defendant to petition to intervene and opposition to judgment and decree by Yojuro Fujisue and Setsu Fujisue; c/m 2/1/68. filed.

February 1 - Motion of defendant for order sustaining objections to interrogatories; notice; exhibit A. M.C. filed.

February 14 - Reply of Yoshikozu Wilson Yamauchi to defendants' opposition to application for payment of claim; c/m 2/12/68. filed.

February 23 - Reply of Auneyo Hayashi, et. al., to plaintiff's response to objections and to defendant's opposition to consent judgment; c/m 2/21/68. filed.

February 26 - Reply brief of movants Yojuro Fujisue and Setsu Fujisue and the class they represent; exhibit; c/m 2/23/68. filed.

February 26 - Reply brief of Hawaii claimants re interest during litigation; exhibits (6); c/m 2/23/68. filed.

February 28 - Appearance of Andrew L. Geisler for pltf Yoshikazu Wilson Yamuchi (Judiciary House (113), 461 - H St., N. W. 20001.) filed.

March 4 - Reply brief of Yoshio Maruyaural, et. al. to objection to consent judgment and decree; c/m 3/1/68. filed.

March 4 - Affidavit of Shiro Koshiwa in support of motion of Hawaii Creditors, Nokama Okushima and Fujisue and classes they represent; exhibit. filed.

March 5 - Order directing defendant to pay out of the vested assets of the Yokohama Specie Bank, Ltd. $950,000.00 as attorneys' fees to Rauh and Silard and Wirin and Okrand. (N) Jones, J.

March 5 - Appearance of Andrew L. Geisler (Judiciary House) as co-counsel with Henry Taketa as attorney for Yu Kato, Muneyo Hayashi, and other claimants of the same class. (461 H St., N.W.) filed.

March 21 - Motion of Kashiwa and Kashiwa for allowance of attorneys fee; exhibits A & B; memorandum; c/m 3/19/68 filed.

March 21 - Additional memorandum of Hawaii creditors; c/m 3/18/68 filed.

April 1 - Opposition of deft. to motion of Kashiwa and Kashiwa for allowance of attorney's fees; c/m 4-1-68 filed.

April 12 - Answer of Kashiwa and Kashiwa to Office of Alien's Property brief in opposition to claim for atty's. fee; c/m 4/10/68. filed.

April 30 - Opinion of granting compensation to legal counsel and overruling objection of deft. to payment of such fees. (See Opinion for

further findings.) (N) Micro 5-1-68 Jones,J.

April 30 - Order denying application to intervene by petitioners Yojuro Fujisue and Setsu Fujisue personally and on behalf of other similarly situated; Overruling objections of said petitioners to Provisional Consent Judgment; Quashing interrogatories submitted by said petitioners to deft; Overruling objections to provisional Consent Judgment and Decree of Claimants Kama Nakama and Sawano Okushima, personally and on behalf of others similarly situated; and overruling objections to paragraph (4) (a) of provisional Consent Judgment and Decree of claimants filing said objections under date of November 24, 1967; Modifying paragraph (4) (a) of provisional Consent Judgment and Decree (to be paragraph (3) (a) in the final Judgment and Decree. (N) Jones, J.

April 30 - Order overruling objections of deft. to application of Thomas H. Carolan and Philip W. Amram for award of attorneys' fees; Directing deft. to ascertain and notify all counsel who participated in this case at the administrative level on behalf of claimants within the HONDA class of the ruling of this Court; Directing counsel desiring to assert a claim for services during the administrative stage to file on or before October 1, 1968 with the Clerk of this court a petition asserting said claim; Directing that the total amount to be paid on said claims of counsel shall not exceed 5% of the total amount paid on the claims of the HONDA class claimants who have not heretofore given powers of attorneys to counsel or have not otherwise retained or contracted for legal services of counsel; Directing that the contractual agreement referred to in paragraph (3) will not necessarily exclude counsel entitled to fees under said contracts from further payment pursuant to a petitionfiled herein; Directing that any counsel fees awarded under the Memorandum of October 25, 1967 and the Opinion and Order of this date shall only be paid out of

the funds remaining in the Yokohama Specie Bank vested assets after all the HONDA class claims are paid, and after counsel fees have been paid to Rauh, Silard, Wirin and Okrand as ordered to be paid in the March 5, 1968 Order of this Court; Reserving to this Court, if deemed necessary and appropriate, the referral of all claims, filed by counsel who appeared during the administrative stage on behalf of claimants coming within the HONDA class, to a Master for hearings, findings, conclusions and report to this Court. (N) Jones, J.

April 30 - Order denying Motion of Shiro Kashiwa and Genro Kashiwa for allowance of attorneys' fees. (N) Micro 5-2-68 Jones, J.

April 30 - Consent Judgment and Decree. (N) Jones, J.

May 27 - Notice of Appeal of Thomas H. Carolan and Philip W. Amram; deposit by Carolan $5.00; copies mailed. filed.

May 27 - Cost bond on appeal of Thomas H. Carolan and Philip A. Amram in amount of $250.00 with National Surety Corp. approved. filed.

June 28 - Notice of cross appeal of deft, Atty. Gen. from order of 4-30-68. (copies mailed to Joseph Rauh, John Silard, A. L. Wirin, Fred Okrand, Gilbert Hahn, Jr., Bruce G. Sundlun, Henry Taketa, Herbert F. Layle, George P. Holt, Kashiwa & Kashiwa, Katsugo Miho, Kigushi & Yansunaga, Yoshitaro Murakami, Tomako and Walders, Stuart H. Robeson). filed.

July 3 - Motion of petitioners Thomas H. Carolan and Philip W. Amram for extension of time to file record on appeal, P & A filed.

July 3 - Motion of petitioners Thomas H. Carolan and Philip W. Amram to supplement record; P & A filed.

July 3 - Order granting petitioners an extension of time to and including July 22, 1968 to file record on appeal from order of April 30, 1968. (N) Jones, J.

July 5 - Hearing on motion of petitioners Thomas H. Carolan and and Philip W. Amram to supplement record begun, concluded and granted. (Rep. T. O'Neal) Jones, J.

July 5 - Order supplementing record. (N) Jones, J.

August 6 - Record on Appeal delivered to USCA: Deposit by Philip Amram $3.35.

August 6 - Receipt from USCA for original papers. filed.

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1. Complaint, Exhibit "A"
2. Summons and Returns
3. Stipulation extending time to file transcript
4. Appearance of Armand B. Du Bois
5. Transcript of record of proceedings in the office of alien property filed Aug. 26, 1964
6. Answer of Deft. to Complaint
7. Motion of Deft. to Dismiss; P&A; Affidavit
8. Motion for Joint Hearing
9. Opposition of Pltfs. to motion to dismiss; Affidavits (4)
10. Praecipe filed Jan. 12, 1965
11. Affidavit of Katsuma Mukaeda
12. Order dismissing complaint
13. Notice of Appeal
14. Letter to Judge Jones filed April 2, 1965
15. Opinion of USCA reversing judgment of USA
16. Appearance of Thomas H. Carolan & Philip W. Amram
17. Motion for entry of consent judgment & decree
18. Application of Pltfs. counsel for fee; Exhibit

19. Petition for Award of Counsel Fees; Exhibits (5)

20. Consent Judgment and Decree

21. Amended Petition for Award of Counsel Fees

22. Memorandum in opposition to application of Carolan and Amram for Attorneys' Fees

23. Appearance of Gilbert Hahn, Jr. and Bardyl Rifat Tirana

24. Motion of Carolan & Amram for leave to file 2nd amended petition; Exhibit A; P&A

25. Reply Memorandum filed July 24, 1967

26. Opposition of Deft. to motion of Carolan & Amram for leave to file 2nd amended petition; P&A

27. Copy of Letter dated 7/21/67

28. Points and Authorities in support of application of Thomas H. Carolan & Philip W. Amram for Attorney's Fees

29. Memorandum filed Oct. 25, 1967.

30. Order filed Oct. 25, 1967

31. Deft's. motion for enlargement of time to respond to Court's Memorandum Order

32. Order filed Nov. 8, 1967

33. Copy of Letter from John Silard dated 5/16/67

34. Copy of Letter from John Silard dated 6/8/67

35. Letter & attached draft letter to Honda claimants from Bart lett S. Atwood to Judge Jones dated 8/10/67

36. Objections to consent Judgment & Decree and Request for Modifications

37. Application for payment of claim; Exhibit

38. Deft's. Exceptions and Objections

39. Objections to consent judgment and decree and request for modifications; Exhibits (4)

40. Objection of Kenichi Nakamura to certain paragraphs of consent judgment

41. Motion in opposition to certain provisions of judgment and decree; Exhibits (3)

42. Opposition of certain petitioners to judgment & decree; Exhibits (2)

43. Objection to consent judgment & decree; Exhibit A

44. Response of petitioners to Govt's. exceptions & objections

45. Letter dated 12/1/67; Exhibit

46. Memorandum of petitioners re: identification of counsel and division of fees

47. Memorandum of petitioners with respect to expections or objections to the Court's opinion

48. Motion of deft. for enlargement of time to respond to opposition to consent judgment & decree

49. Declaration of interpreter & certified translation of Bank of Tokyo, Ltd.

50. Motion for entry of final judgment & decree; Exhibits A, B, & C

51. Comment of Thomas H. Carolan & Philip W. Amram on motion for entry of final judgment & decree

52. Objection of Yoshitaro Murakami to consent order

53. Appearance of Stuart H. Robeson

54. Order filed Jan. 22, 1968

55. Interrogatories to Deft.

56. Plaintiffs' response to objections to consent judgment; Exhibits (2)

57. Defendant's Opposition filed Feb. 1, 1968

58. Deft's. opposition to objection to consent judgment and decree

59. Deft's. opposition to objections to consent judgment and decree and request for payment

60. Deft's. opposition to objections to consent judgment and decree and request for modifications

61. Deft's. opposition to "Application for payment of claim"

62. Deft's. opposition to objections to consent judgment and decree and request for modifications filed by Yu Kato

63. Deft's. opposition to motion and objections to consent judgment and decree filed by Yoshitaro Murakami

64. Deft's. opposition to petition to intervene and opposition to judgment and decree

65. Deft's. motion for an order sustaining objections to interrogatories; Notice; Exhibit A

66. Reply to Deft's. opposition to "Application for payment of claim"

67. Reply to Pltfs. response to objections and to Deft's. opposition to consent judgment

68. Reply brief of movants Yojuro Fujisue & Setsu Fujisue and the class they represent; Exhibit

69. Reply brief of Hawaii claimants regarding interest during liquidation; Exhibits (6)

70. Appearance of Andrew L. Geisler

71. Reply brief to objection to consent judgment and decree filed by Yoshio Maruyama, et al

72. Affidavit of Shiro Koshiwa, etc., filed March 4, 1968; Exhibit

73. Order filed March 5, 1968

74. Appearance of Andrew L. Geisler as co-counsel

75. Motion of Kashiwa & Kashiwa for allowance of attorneys fee; Exhibits A & B; Memorandum

76. Additional memorandum of Hawaii creditors

77. Deft's. opposition to motion of Kashiwa and Kashiwa for allowance of attorneys' fee

78. Answer of Kashiwa and Kashiwa to Office of Alien's Property brief in opposition to claim for atty's fee

79. Opinion filed April 30, 1968

80. Order filed April 30, 1968

81. Order filed April 30, 1968

82. Order denying motion of Kashiwa and Kashiwa for allowance of attorneys' fees

83. Consent Judgment and Decree

84. Notice of Appeal

85. Notice of Cross Appeal

86. Motion for extension of time to file record on appeal and to docket appeal; P & A

87. Motion to Supplement Record; P & A

88. Order filed July 3, 1968

89. Order Supplementing Record

90. Exhibit: Complaint and Final Order filed 5/18/64 in Civil Action No. 3164-58

91. Exhibit: Complaint and Interlocutory Order filed 3/17/64 in Civil Action No. 2529-61

[Filed May 19, 1964]

COMPLAINT FOR DECLARATORY AND OTHER RELIEF

1. This Court has jurisdiction under 5 U.S.C. 1009, 28 U.S.C. 1331, 1357 and 2201, and 50 USC Appx. 34f, as amended.

2. Plaintiffs are former depositors in the Yokohama Specie Bank, Ltd., who had assets on deposit in said bank on December 7,

1941. They then held identically-worded yen Certificates of Deposit issued to them in the United States in exchange for the deposit of dollars in said bank, which Certificates were redeemable upon demand in dollars at the offices of the bank in the United States or in yen at the offices of the bank in Japan.

3. Plaintiffs file this action on their own behalf and on behalf of all others similarly situated. The persons so situated, several thousand in number, are so numerous as to make it impracticable to bring them all before the Court, and each of them has an identical claim against the funds of said bank seized by the United States Government, based upon identical yen deposit certificates, differing only as to date, amount, name of depositor and amount of interest. Hereinafter, unless otherwise stated, the term plaintiffs will be used to describe the entire class on whose behalf this suit is filed.

4. Defendant, Robert F. Kennedy, is the Attorney General of the United States. He is a successor in office to the Alien Property Custodian who on December 7, 1941 seized, and in 1943, pursuant to the Trading with the Enemy Act as amended (50 USC Appx. 34, 620), vested certain properties of the Yokohama Specie Bank, Ltd., including the funds plaintiffs had on deposit therewith. Unless otherwise stated, the term defendant will be used hereinafter to refer to the named defendant and/or his predecessors in office or the Office of Alien Property, as the context may require.

5. Pursuant to the Trading with the Enemy Act, plaintiffs submitted timely debt claims to defendant on account of the seizure of their assets as aforesaid.

6. Defendant thereafter recognized the validity of plaintiffs' claims by written communications in 1958 and 1959. A letter typical of that sent to each of the plaintiffs is attached hereto as Exhibit "A" and by this reference made a part hereof. Defendant, however,

proposed to pay at the ratio of 361.55 yen per dollar, rather than return to plaintiffs their money which defendant had seized at the ratio of approximately 4 yen per dollar (23.4 cents per yen), which was the true and accurate ratio of dollars to yen and the appropriate ratio for measuring the dollar value of plaintiffs' holdings and just claims under said Act.

7. Plaintiffs did not, in 1958 and 1959, submit for payment in the proposed reduced amounts, their original certificates, as they were invited to do by the letters of defendant (see Exhibit A), because (a) the proposed amount of payment was legally erroneous, inadequate and arbitrary (representing but 1.18 per cent of their true claim), as hereinabove set forth in paragraph 6; because (b) they were unwilling to surrender at that time their original certificates constituting the physical evidence of their right and claim; because (c) they feared that submission of their original certificates for payment of the proposed legally erroneous amount would constitute acquiescence in the adequacy and legality thereof, and because (d) many of the plaintiffs were and are old people who could not read English and did not understand the communications of the defendant.

8. The Office of Alien Property had, and has, photostatic copies of each of plaintiffs' Certificates. Such photostatic copies of each of plaintiffs' Certificates were required by said Office as a condition of the timely filing and consideration of the claims of all claimants; the Office of Alien Property at all times had, and has, access to or possession of the books of the Yokohama Specie Bank, Ltd. which showed and show who were and are the holders of the Deposit Certificates, the numbers and amounts thereof; and the said Certificates were and are non-negotiable. It was not necessary, therefore, as a condition of the allowance of the plaintiffs' claims, as distinguished from the

payment thereof, that the Office of Alien Property have in hand the original Certificates.

9. Subsequently the defendant dismissed each of the plaintiffs' debt claims for failure to file original Certificates, as requested in the communications from defendant to plaintiffs, an example of which is attached hereto as Exhibit A.

10. Pursuant to Section 34f of the Trading with the Enemy Act as amended (50 USC appx. 34f), on May 11, 1961, defendant published a schedule of claims proposed to be paid from assets of the Yokohama Specie Bank, Ltd., none of which included plaintiffs' claims. Thereafter, beginning about August 1, 1961, he began to mail said schedule to the various debt claimants. On August 13, 1961, a class suit on behalf of persons thus scheduled for payments was filed in this Court in the case of Abe v. Kennedy, Civil Action Number 2529-61, to test the adequacy of the proposed yen-dollar ratio under said schedule, which constituted the same issue then existing between plaintiffs herein and defendant. Plaintiffs were not included among the class on whose behalf said suit was filed.

11. On or about April 27, 1964 the Abe suit was settled by an order of this Court awarding payment to the plaintiffs therein of the principal of their claims at a ratio of approximately 23 cents per yen. Said settlement did not exhaust the amount of money held by defendant and defendant still holds funds in sufficient amount to pay plaintiffs on the same basis as said settlement. On information and belief, plaintiffs allege that the present administrative policy of defendant is to pay all valid claims based upon seizure of the assets in the Yokohama Specie Bank, Ltd., in the ratio of approximately 23 cents per yen.

12. Plaintiffs, as set forth above in paragraph 6, have proved to the satisfaction of the defendant that they hold valid debt claims on

account of the seizure of their assets in the Yokohama Specie Bank, Ltd. Plaintiffs allege on information and belief, that nevertheless defendant declines to pay the just debt claims of plaintiffs solely because original certificates were not by them submitted to defendant in 1958 and 1959, as above set forth in paragraph 7.

13. The requirement imposed by defendant for the submission of original certificates as a prerequisite to award of the proposed legally inadequate and erroneous amount, was arbitrary and unauthorized. Defendant now recognizes by virtue of the conversion rate by him employed, as set forth in paragraph 11 above, the error of his previously proposed conversion ratio. Refusal now to pay plaintiffs' valid debt claims solely for their failure to comply with the defendant's previous arbitrary and unauthorized demand for original certificates, as aforesaid, is injurious, inequitable, contrary to the statutory rights of plaintiffs and deprives them of property without due process of law.

14. Plaintiffs were and are ready, willing and able to surrender their original Certificates as a condition of receiving award or payment of their claims on the conversion formula set forth in paragraph 11 above, at such time as requested, noticed or ordered to do so by the defendant or by this Court.

WHEREFORE, plaintiffs pray that the Court declare their rights herein, specifically their right not to have their debt claims rejected on account of the unlawful requirement earlier imposed for submission of original certificates; that they be paid in the same conversion

ratio as plaintiffs in Abe v. Kennedy, No. 2529-61, and for other appropriate relief.

/s/ Joseph L. Rauh, Jr.

/s/ John Silard

1625 K Street, N.W.
Washington 6, D. C.

/s/ A. L. Wirin

/s/ Fred Okrand

257 South Spring Street
Los Angeles 12, California

/s/ Marshall Ross

139 South Beverly Drive
Beverly Hills, California

Attorneys for Plaintiffs

[Filed May 19, 1964]

[Exhibit A]

Registered Mail
Return Receipt Requested

Ayako Honda
1576 Valota Rd.
Redwood City, California

Dear Sir:

Reference is made to the above-numbered debt claim which has been filed with this Office with respect to the insolvent account of the Yokohama Specie Bank, Ltd. The claim is based upon yen certificates of deposit.

The Director of this Office decided on November 13, 1957, In the Matter of Kunio Abe, et al., Claim No. 55507, Docket No. 55 D 72,

which decision the Attorney General has declined to review, that yen certificates of deposit issued by the Yokohama Specie Bank, Ltd. and the Sumitomo Bank, Ltd. are obligations payable in yen in Japan, and that claims based on such certificates of deposit are to be allowed and paid in United States currency at the post war rate of exchange in accordance with the "Judgment Day" rule set forth in Deutsche Bank v. Humphrey, 272 U.S. 517 (1926). Thus, the current case of exchange of 361.55 yen to one dollar must be used in converting the yen into a dollar amount. Interest is allowable from the date of deposit to the date of payment.

Therefore, if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of $9.09 plus interest. If you have lost your certificates, you should prepare a statement setting out that the deposits were made as alleged in the Notice of Claim form, giving the numbers of the certificates, the dates of the deposits, and the branch of the Bank at which the certificates were purchased. You should also state that you have not received payment from the Bank or accepted renewed certificates of deposit. This statement should be signed and sworn to by you before a Notary Public and forwarded to this Office in support of your claim.

Payment of your claim, however, will not be made immediately. Under the procedures set forth in section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C.App.34(f)), it is necessary that all of the approximately 9000 claims filed against the Yokohama Specie Bank, Ltd. be reviewed and a schedule issued showing the proposed payments before any payments can be made. Within sixty days after the issuance of the schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney as de-

fendant. If no complaint for review is filed, payments will be made in accordance with the schedule.

Advice received by this Office is to the effect that yen certificates of deposit accounts are carried on the books of the Yokohama Specie Bank, Ltd. in Japan, and the funds may be withdrawn in that country or transferred to the Bank of Tokyo, Ltd. Under the circumstances, you may wish to utilize the funds in Japan rather than await settlement by this Office. If this is done, the Notice of Claim filed with this Office should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim card.

If, however, you wish to maintain your claim with this Office you are requested to submit the original certificates of deposit or the notarized statement as to why they cannot be forwarded. In the event you object to the allowance of your claim in the amount stated above, you should submit the certificates to this Office within the next forty-five days and file a statement specifying your objections, together with the reasons in support thereof. Upon receipt of your objections, if I consider them to be without merit, I shall apply to the Director of this Office, pursuant to section 502.25(i) of the Rules of Procedure for Claims, a copy of which is enclosed, for the entry of an Order allowing your claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount on the ground that there is no debt due and owing to you by the Yokohama Specie Bank, Ltd. in excess of that amount. In acting upon my application, the Director will consider the statement of objections that you may have submitted.

On the other hand, if within the next forty-five days you do not submit the original certificates of deposit or a statement explaining why they cannot be forwarded. I shall conclude that the claim has been abandoned in its entirety and, without further notice to you, shall

apply to the Director for the entry of an Order dismissing the claim on the ground of abandonment, pursuant to section 502.25(g) and (i) of the Rules of Procedure for Claims.

To recapitulate:

1. If you wish to maintain your claim with this Office, you should within forty-five days forward the original certificates of deposit and, if you wish to do so, file a statement of your objections to the allowance of the claim in the amount stated above.

2. If you wish to maintain your claim but do not have the original certificates of deposit, you should within forty-five days submit a statement, signed and sworn to before a Notary Public, giving the details of the deposits and stating that you have not received payment or renewed certificates. If you wish to do so, you may also file a statement of your objections to the allowance of the claim in the amount stated.

3. I shall then apply to the Director for an Order allowing your claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount. Where objections have been filed, they will be submitted to the Director for his consideration in acting upon your claim.

4. If, within forty-five days, you do not submit the original certificates of deposit or an explanation as to why you cannot forward them, I shall conclude that the claim has been abandoned and shall apply to the Director for an Order dismissing the claim on that ground.

5. If you prefer to utilize the funds in Japan, you should sign and mail the enclosed Notice of Cancellation of Claim card in order to clear the records of this Office.

Please note that the original certificates must be submitted; photostatic copies cannot be substituted.

Sincerely yours,

/s/ Arthur R. Schor
Chief, Claims Section
Office of Alien Property

Enclosures

cc: Wirin, Rissman & Okrand
257 South Spring Street
Los Angeles 12, California

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY
WASHINGTON, D. C.

In the Matter of: Ayako Honda (Insolvent Estate of the Yokohama Specie Bank, Ltd., alleged debtor, V. O. Nos. 1501, et al.)	Debt Claim No. 52200

ORDER DISMISSING DEBT CLAIM

(Abandonment)

Pursuant to section 502.25(i) of the Rules of Procedure for Claims of this Office (8 CFR 502.25(i)), the Chief of the Claims Section by letter dated February 9, 1959, notified the claimant by registered mail, return receipt requested, that unless necessary information for the processing of the claim under section 34 of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34), was received within forty-five (45) days from the date of said letter, he would apply to the Director for an Order dismissing the claim on the ground

of abandonment. A copy of section 502.25 (g) and (i) of the Rules of Procedure for Claims was enclosed with the letter, setting forth the claimant's right to object to the proposed dismissal. More than forty-five days have elapsed since the mailing of the letter and no reply has been received with respect thereto.

Upon the application of the Chief of the Claims Section and finding that the said claim has been abandoned;

IT IS ORDERED that this claim be and it is hereby dismissed and disallowed. It should be noted that the aggregate of debt claims filed against the Yokohama Specie Bank, Ltd., exceeds the money from which payment may be made by this Office and that any further proceedings are governed by section 34(f) of the Trading with the Enemy Act, as amended.

Dated at Washington, D. C., 12 May 1959.

/s/ Paul V. Myron
Deputy Director
Office of Alien Property

Registered Mail 784349

CLAIMANT: Ayako Honda
1576 Volota Road
Redwood City, California

NOTICE

Attached is a copy of a Final Schedule issued under Section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34), in respect of the Yokohama Specie Bank, Ltd., an insolvent debtor, listing the claims in respect of said debtor allowed as priority (3) claims and as non-priority claims and the payments to be made

thereon. If your claim is not shown on the Schedule, it is for the reason that the claim has been dismissed and disallowed by this Office.

This Schedule is being served by registered mail on all claimants listed therein, as well as on claimants whose claims have been dismissed and disallowed. Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as defendant. A copy of such complaint must be served on the Attorney General and on each claimant named in the Schedule. If no such complaint for review is filed within the sixty-day period, payments to claimants will be made by this Office as specified in the Final Schedule.

Date: Oct. 6, 1961.

/s/ Paul V. Myron
Deputy Director
Office of Alien Property

Enclosure

[Filed March 31, 1965]

ORDER

Defendant's motion to dismiss having come on for hearing and the Court having considered the memoranda in support thereof and in opposition thereto, having heard argument of counsel, and having concluded that the Court lacks jurisdiction over the subject matter of this action because it was not commenced within the time set forth in Section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f), it is this 31st day of March, 1965

ORDERED that plaintiffs' complaint be and the same is hereby dismissed.

/s/ William B. Jones
Judge

Counsel:

Joseph L. Rauh, Jr., Esq.
John Silard, Esq.
A. L. Wirin, Esq.
Fred Okrand, Esq.

For Plaintiffs

John W. Douglas, Esq.
Anthony L. Mondello, Esq.
Armand B. DuBois, Esq.

For Defendant

[Filed June 15, 1967]

MOTION FOR ENTRY OF CONSENT
JUDGMENT AND DECREE

Come now counsel for plaintiffs and counsel for the defendant and move that in this case the Court adopt and enter the Consent Judgment and Decree agreed upon by the parties and attached to this application. In support thereof the parties show as follows:

(1) This is a class action for declaratory and injunctive relief brought under Section 34(f) of the Trading With the Enemy Act by or on behalf of several thousands of persons denied payment of their debt claims by defendant, the Attorney General of the United States. The plaintiffs are holders of Yokohama Specie Bank, Ltd., yen certificates of deposit. As asserted in the Complaint, they submitted timely debt claims under Section 34 of the statute against the vested assets of the Yokohama Specie Bank, Ltd., which the defendant later

declined to pay on the stated view that the claims had been abandoned, under circumstances more fully set forth in the Complaint. Plaintiffs prayed that the Court specifically declare their rights and that they be "paid in the same conversion ratio" as plaintiffs in Abe v. Kennedy, No. 2529 -61, United States District Court for the District of Columbia.

(2) The original named plaintiffs in this suit were Ayako Honda, Kaneckichi Murakami, Keneyo Sato, Tomi Tsuji and Gensuke Yoshida. On January 12, 1965 Michiko Terao, Shigeo Kumashiro, Jiro Kai and Kyuji Hozaki were added by praecipe as additional named plaintiffs. None of the named plaintiffs and the members of the class they represent transmitted their original certificates of deposit to the defendant in 1958 or 1959 upon request by defendant, and none of them were listed in the 1961 Yokohama Specie Bank debt schedule published by the defendant. Some of the named plaintiffs (Yoshida and Sato) transmitted a "Notice of Cancellation of Claim" card to the defendant, which has been attached to the 1958-59 communications from defendant stating that "the current rate of exchange of 361.55 yen to $1.00 must be used in converting" their yen certificates. Some of the plaintiffs also have redeemed or transferred their Yokohama Specie Bank certificates pursuant to the defendant's suggestion in said letter as follows:

> "Advice received by this Office is to the effect that yen certificate of deposit accounts are carried on the books of the Yokohama Specie Bank, Ltd. in Japan, and the funds may be withdrawn in that country or transferred to the Bank of Tokyo, Ltd. Under the circumstances, you may wish to utilize the funds in Japan rather than await settlement by this office. If this is done, the Notice of Claim filed with this Office should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim Card."

(3) Following the filing of this action, the defendant moved that it be dismissed as untimely because not brought within the 60 day limitation period of Section 34(f) of the Trading With the Enemy Act. On March 31, 1965, this Court entered an order dismissing the Complaint herein "because it was not commenced within the time set forth in Section 34(f) of the Trading With the Enemy Act as amended * * *" Upon timely appeal the United States Court of Appeals for the District of Columbia Circuit entered an opinion and judgment (Circuit Judge Wright dissenting) on January 31, 1966 affirming this Court's dismissal of the complaint as untimely under the statute. A petition for rehearing en banc was denied on February 24, 1966. A petition for certiorari to the United States Supreme Court was filed, and was granted by that Court on October 24, 1966.

(4) Before the United States Supreme Court the defendant conceded that plaintiffs' claims were valid and payable except for their delay of more than 60 days in the filing of judicial suit following the 1961 promulgation of the OAP's Yokohama Specie Bank schedule. Counsel for plaintiffs urged in their briefs and argument to the Supreme Court that "There has never been any question about petitioners' statutory eligibility for an Alien Property return, which the Government expressly recognized as long back as 1958 * * *" The brief of the defendant before the United States Supreme Court was in essential agreement with that representation. As there stated "The Attorney General rejected petitioner's demand" in 1964 for similar payment to that afforded their fellow-claimants in the Abe litigation, being "of the view that these claims were barred by the limitation period prescribed in Section 34(f) * * *". As the Supreme Court's subsequent opinion found, "The Attorney General denied their claims because petitioners were not included in the class represented in the

Abe suit, and because they had not filed their suit within 60 days after mailing of the schedule as required by § 34(f)."

(5) The opinion of the United States Supreme Court, issued on April 10, 1967, rejected the defendant's pleas of limitations and indicates the appropriateness of the payment of plaintiffs' claims at this time on the same basis accorded their fellow-claimants in the Abe litigation, to the extent that the vested funds are sufficient therefor. In the course of its opinion (n. 8) the Supreme Court also stated:

> "Neither in his motion to dismiss the complaint in the District Court, nor on review in the Court of Appeals and in this Court, has the Attorney General advanced the argument that failure to comply with this administrative regulation is by itself an independent reason for dismissing this suit. It suffices to say here that such an argument would be open to attack on lines similar to those we hold require tolling the statute of limitations."

(6) On the basis of the foregoing circumstances the parties hereto are in agreement that the plaintiffs are now entitled to payment by defendant on the same basis accorded their fellow-claimants in the Abe litigation (.26133 cents per yen), to the extent that vested assets of the Yokohama Specie Bank are sufficient therefor. They are also agreed that the class of claims entitled to payment consists of debt claims based upon the Yokohama Specie Bank yen certificates which are otherwise eligible for payment under the statute, irrespective of the failure of the claimant to have tendered original deposit certificates to the defendant, or of his withdrawal of the claim, and notwithstanding the redemption or conversion of his certificates following the defendant's 1957 ruling denying a pre-war rate of exchange (subject, however, to an approximate 2% reduction in pay-payment because of such prior redemption or conversion). The pa-

ties are also agreed that while not technically within the class of plaintiffs herein, in view of the Supreme Court's approach to the question of delay under the statute, payment is due and should be awarded to a small additional group of claimants. These are persons who actually dispatched their claims to the Government prior to the deadline for filing on November 18, 1949, but whose claims were received by the Government only in subsequent days.

(7) The parties further submit that the procedure for provisional promulgation, notice, opportunity of hearing, final promulgation, submission of evidence by claimants, and payment under the Judgment shall, as prescribed in the proposed Consent Judgment and Decree, be as follows:

First: the Court is requested to promulgate the Consent Judgment and Decree provisionally, subject to individual notification to the claimants of their right to hearing and protest by motion made not later than December 1, 1967 (Decree, Paragraph 5);

Second: immediately following such provisional promulgation of the Judgment and Decree, the parties will cause appropriate publicity to be given in leading English and Japanese language newspapers in the United States and Hawaii, setting forth the general terms of the Consent Judgment and asking all persons believing themselves to be eligible for payment thereunder to make their addresses known to the Department of Justice. Included among such newspapers shall be the following:

Los Angeles Times, Los Angeles, California
Honolulu Star Bulletin, Honolulu, Hawaii
San Francisco Chronicle, San Francisco, California
Nichibei Times, San Francisco, California
Hokubei Mainichi, San Francisco, California
Rafu Shimpo, Los Angeles, California
Kashu Mainichi, Los Angeles, California
Michibei Mainichi, Los Angeles, California

Crossroads, Los Angeles, California
Pacific Citizen, Los Angeles, California
Oregon Weekly, Portland, Oregon
North American Post, Seattle, Washington
Utah Nippo, Salt Lake City, Utah
Colorado Times, Denver, Colorado
Rocky Mountain Jiho, Denver, Colorado
Chicago Shimpo, Chicago, Illinois
New York Nichibel, New York, New York
Hawaii Times, Honolulu, Hawaii
Hawaii Hochi, Honolulu, Hawaii

In addition to such publicity, requests for current addresses will be published through the Japanese-American Citizens League having 88 chapters and members in 32 states of the Union; and through the Japanese Chamber of Commerce and similar organizations in major cities throughout the United States and Hawaii;

Third: as current addresses become available to the Department following promulgation of the provisional Judgment and Decree, defendant will mail to each claimant or his known successors an individual notice explaining their rights and the procedures to be followed, and enclosing the text of the provisional Judgment and Decree. Not later than November 1, 1967, such individual notices will also be mailed to the remaining claimants for whom no current addresses have thus become available, to their last known address reflected in the case files at the Department of Justice;

Fourth: following the expiration of the period for notice and protest on December 1, 1967, and upon promulgation of the final Judgment and Decree, defendant shall receive from claimants under this Judgment original yen certificates of deposit or evidence of loss, destruction, or conversion as prescribed in Paragraph (3) of said Decree up to but not later than July 1, 1968. Pursuant to Paragraph 4(c) of the proposed Judgment and Decree, the defendant shall not be required to pay claims thereunder which have not been authenti-

cated in the prescribed manner by July 1, 1968. Provision for a similar cutoff date (January 1, 1965) was approved by the District Court in the Abe compromise-settlement on March 17, 1964; see also order of Judge Pine in Societe Internationale v. Brownell, Civil Action 4360-48, entered December 16, 1953 establishing March 31, 1954 as the bar date for intervention and participation in the assets distribution in that case.

Fifth: that defendant shall promptly pay the counsel fee prescribed in Paragraph (2) of the Decree, and make payment to individual claimants entitled to distribution under the Judgment and Decree on and after July 1, 1968, as the ratios prescribed in Paragraph (3) thereof.

WHEREFORE, it is respectfully moved that the Court issue the Consent Judgment and Decree in the form attached hereto:

1. Declaring the right to payment on the classes of Yokohama Specie Bank debt claims defined in Paragraph (1) and delimited in Paragraph (4) of the attached Judgment and Decree.

2. Awarding such attorneys' fee under Paragraph (2) of the attached Judgment and Decree as the Court shall deem fair and appropriate, on principles similar to those underlying the award of fees in the Abe litigation, on the basis of verified applications for counsel fees.

3. Decreeing the conversion ratio and the procedure of payment on said claims as set forth in Paragraph (3) of the attached Judgment and Decree.

4. Providing under Paragraph (5) of the attached Judgment and Decree that it shall be provisional until due notice and opportunity of

hearing is afforded to the persons who are beneficiaries of the proposed decree.

Respectfully submitted,

John Silard
Attorney for Plaintiffs

/s/ Irving Jaffe

/s/ Bartlett S. Atwood

Attorneys for Defendant

[Certificate of Service Omitted in Printing]

[Filed June 29, 1967]

VERIFIED APPLICATION FOR AWARD OF COUNSEL FEE

Come now Joseph L. Rauh, Jr., John Silard, A. L. Wirin, and Fred Okrand, plaintiffs' counsel in this case, and respectfully petition the Court to award to them as the counsel fee specified in Paragraph 2 of the Consent Judgment and Decree heretofore submitted for promulgation to this Court, the amount of $950,000.00. This sum constitutes less than ten percent of the fund now in the possession of the defendant which has been made available for distribution to claimants under the Consent Judgment and Decree by virtue of the successful efforts of plaintiffs' counsel in this class action. The joint motion by the parties for entry of the Consent Judgment and Decree asks that a fee award be made by the Court on principles similar to those underlying the award in the Abe case. In support of this application the undersigned represent as follows:

1. The fund made available for distribution under the Judgment. We have been advised by the Department of Justice that the vested assets of the Yokohama Specie Bank, Ltd. now in the possession of

the defendant, are in the amount of $11,749,705.61, which amount will will not increase nor be reduced until payments are made under the proposed Judgment in this action. This is the fund made available by the successful efforts of plaintiffs' counsel in this litigation.

2. The aggregate claims payable under the Judgment. We have been advised by the Department of Justice that a tabulation of all Yokohama Specie Bank yen claims payable under the Consent Judgment and Decree shows about 6,000 such claims, having a total value at the conversion ratio specified in the Consent Judgment and Decree exceeding 10.5 million dollars.

3. Counsel fee effect on claimants' recovery. Since the aggregate claims payable at the Abe ratio under the Consent Judgment and Decree (paragraph 2 above), plus counsel fee, equal or slightly exceed the vested assets available for payment (paragraph 1 above) if all claimants are located and found eligible, the award of a counsel fee payable from those assets might slightly reduce each claimant's potential recovery at the stipulated ratio. However, neither we nor the Department of Justice attorneys familiar with this case believe that all of the claimants will be located and found eligible. Rather, it is firmly believed that even with the best efforts to do so (as outlined in paragraph 7 of the joint motion heretofore filed by the parties) a considerable number of the claimants will not be found, and that accordingly the counsel fee stipulated herein will still permit payment to each claimant under the Judgment at the same conversion ratio (26.133 cents per yen) received by the claimants in the Abe case.

4. Comparison with fee awarded in Abe. In the Aratani-Abe litigation a total fund of $6,395,357.56 was made available for distribution among fewer than three thousand claimants and a counsel fee (20%) was awarded in the amount of $1,279,071.50 ($242,761.69 on

account of the Aratani representation and $1,036,309.82 for the Abe success). In the present case a total fund of over eleven million dollars has been made available for distribution among some six thousand claimants, and award of a counsel fee of less than 10% thereof is requested in the amount of $950,000.00.

5. Comparison with claimants' benefit in Abe. In the award of counsel fee by Judge Walsh on March 18, 1964 in Aratani-Abe, the Court emphasized that each claimant was receiving under the compromise settlement "approximately 85 times the amount allowed by the Office of Alien Property" prior to the successful litigation. Claimants in this case were offered by defendant the same amount in 1958-1959 as their fellow claimants in Abe and are to be paid at the same conversion ratio ultimately received by the Abe litigants. Accordingly, the recovery per claimant here is equally 85 times the pre-litigation offer of payment by the defendant.

6. Comparison with risks and difficulty of success in Abe. In Aratani-Abe the conversion ratio litigated by counsel on behalf of these plaintiffs was a substantial and difficult one. Nevertheless, the Government regarded the prospects of plaintiffs' victory therein sufficiently substantial to warrant a compromise settlement following the Supreme Court's grant of certiorari. In the present case, as the Court is aware, the plaintiffs' prospects for succeeding on the difficult statute of limitations issue presented were even more remote. Evidencing that fact is the refusal of the Government, as contrasted with Aratani-Abe, to settle this case even after a dissenting opinion in the Court of Appeals and the Supreme Court's grant of certiorari. We believe it is a fair evaluation that counsel here undertook a cause even more risky and difficult of success than the Abe suit.

7. Comparison with counsels' efforts in Abe. Counsel in the Aratani-Abe litigation expended substantial efforts recited in the District Court's March 17 and March 18, 1964 orders in that litigation. In the present case plaintiffs' counsel have expended substantial efforts comparable to Aratani-Abe. Although less time has been spent than by counsel in Aratani it appears that more time has been spent than by counsel in Abe. Unlike the Abe case which never went beyond the filing of a District Court Complaint,[1] the present case was briefed and argued on motion to dismiss in this Court, on the mertis in the Court of Appeals, on petition for certiorari, and on the merits in the United States Supreme Court.

The efforts of counsel Wirin and Orand prior to and during the litigation in this case are summarized in the following narrative statement verified by their oath attached hereto:

> During 1953 inquiry was made of our office concerning the yen deposit claims. We began an investigation seeking to determine the legal and factual basis for the claims and their status. We corresponded with individuals in New York and Washington and spoke on the long distance telephone and in person with them. Our investigation convinced us that the claims had merit and we agreed to represent a number of claimants seeking our services.
>
> By 1955, there had not yet been administrative hearings on the claims and our information and judgment was to the effect that legislation which

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[1] In the Aratani-Abe litigation on the conversion ratio question, counsel time was principally expended not in Abe (involving the present plaintiffs' fellow Yokohama Specie Bank claimants) but in the Arantani case involving Sumitomo Bank claimants. Aratani was the case which proceeded through the District Court and the Court of Appeals to the grant of certiorari, resulting in the Government's agreement to a compromise settlement. Meanwhile, the Abe case went no further than the filing of the Complaint in the District Court, was held dormant by agreement pending the outcome of Aratani, and was settled simultaneously therewith.

was pending before Congress and which sought to wipe out the yen deposit claims stood a good chance of passage. We determined that the matter should be brought before the courts. Accordingly, we prepared and, on or about June 2, 1955, filed in the United States District Court for the Southern District of California a law suit seeking favorable adjudication of the claims. Said case was entitled Nishikawa v. Brownell, No. 18267-T-Civil. Upon learning that, after long delay, the Government was apparently prepared to hold early hearings in Los Angeles on the claims, we dismissed the action without prejudice. In connection with the administrative hearings that were held in Los Angeles in October 1955, Mr. Marshall Ross attended as an observer on our behalf.

On December 9, 1955 we requested the Office of Alien Property to enter our appearances on behalf of certain claimants. On December 12, 1955, we sent a similar list of claimants and a request for leave to participate in the administrative proceedings to Hearing Examiner Carr. By letter dated April 16, 1956, Hearing Officer Carr granted us permission to file an amicus curiae brief. Said brief was prepared and filed by us on or about July 16, 1956.

Following the decision of the Hearing Examiner and the referral of the case to the then Director of the Office of Alien Property, we examined reports as to testimony given and position taken by the Director in Congressional hearings on the legal questions involved in the proceedings, and determined it proper in order to protect the claimants to seek a waiver or disqualification by the Director. We filed a suggestion to that end.

Following the final determination of the Office of Alien Property adverse to the claimants, we, in order to protect our clients, and, if necessary, all claimants, prepared a draft of a complaint to review the decision, for filing in the United States District Court for the District of Columbia. Upon learning that the office of Mr. Thomas Carolan was going to file a class action to protect his clients, who we be-

lieved to constitute a majority of the Yokohama Bank claimants, we decided to avoid duplication, and therefore not to file the complaint.

In the spring of 1964 we learned of the compromise settlement in the Aratani-Abe litigation. We also learned for the first time that the settlement did not include payment for the many thousands of Yokohama Bank certificates claimants who had not sent in their certificates to the OAP and were therefore not on the OAP's 1961 published schedule. At that time, in addition to representing some of the claimants who were members of the class included in the Aratani-Abe litigation, we represented a number of claimants who had not sent in their original certificates. Mr. Wirin promptly made a trip to Washington, D.C. in April, 1964, for the purpose of determining whether to intervene in the settlement or institute new litigation in behalf of the non-covered claimants, and to negotiate a payment with Messrs. Carolan and Amram on behalf of Mr. S. Kimura. Mr. Kimura had acted as interpreter-translator and asserted that he had performed other miscellaneous services for Alfred Gitelson, Esq., associated with Thomas Carolan and Philip Amram, Esqs. Mr. Wirin negotiated with Carolan and Amram disbursement, from the awarded counsel fees of $1,279,071.50, of $40,000 for Mr. Kimura and $20,000 for Wirin and Okrand. We accepted that modest amount because of our determination to file the present litigation; protest concerning the exclusion from the settlement of those claimants who had not sent in their original certificates had proved unavailing and we had determined to file suit against the Government on their behalf.

Pursuant to that determination, in April of 1964 we consulted with and retained the firm of Rauh and Silard as counsel to prosecute an action in the District of Columbia courts. Thereafter we have actively participated with them in this litigation in the preparation of the Complaint and memoranda to the Department of Justice, in the furnishing of affidavits and other relevant documentation, in the oral arguments in the District Court and the Court of Appeals, and in the briefing of the case at its various judicial

stages. The nature of these efforts between 1964 and 1967 is more fully set forth below in the narrative statement of Joseph L. Rauh, Jr. and John Silard.

The efforts of Counsel Rauh and Silard prior to and during the litigation in this case are summarized in the following narrative statement verified by their oath attached hereto:

> Early in 1964 we were requested by Messrs. Wirin and Okrand to associate ourselves with them in prosecuting actions in the federal courts (Honda, Kondo, and Okamoto) in the District of Columbia on behalf of class-action plaintiffs seeking a Trading With the Enemy Act return on Yokohama Specie Bank yen deposit certificates.
>
> Following extensive deliberations and legal research to undertake this representation on a contingent basis. In so doing, we estimated our chance of judicial success to be very small and our chance for a settlement with the Government to be not much larger. Nevertheless, recognizing the major injustice which we believed to have occurred in this case, and believing that equity power could be applied to prevent an unjust plea of the 60-day statute of limitations, we undertook the active prosecution of these actions.
>
> From the outset, we pursued the possibility that the Department of Justice might amicably settle the matter. Accordingly, before and shortly after the filing of the Honda suit we conferred with the Assistant Attorney General in charge of the Civil Division, and members of his staff, and submitted a memorandum of law justifying our requested settlement. However, the efforts to achieve an amicable settlement, and numerous similar meetings and efforts at successive stages of the litigation proved unsuccessful.
>
> The litigation of the case itself presented many difficult and unresolved issues of law requiring research, briefing, and argument. The memorandum of law submitted to the District Court, the two briefs we submitted to the Court of Appeals, as well as our Petition for Certiorari (and Reply Memorandum) and our Brief on the merits (and Reply) in the United

States Supreme Court are or can be made available to this Court. Among the issues requiring briefing and argument which we covered therein were questions relating to (1) the legislative intent of the limitation period in the Trading With the Enemy Act; (2) the question whether statutory limitations apply to an action in the nature of mandamus to compel the exercise of administrative discretion; (3) the doctrine of equitable estoppel against limitations, and its applicability in suits against the United States; (4) the applicability of the doctrine of sovereign immunity to suits under the Trading With the Enemy Act and to claims for equitable estoppel thereunder; (5) the applicability of limitations to plaintiffs who were without counsel to advise them of their rights; and (6) the applicability of limitations-tolling — particularly following the decision by the Supreme Court of Burnett v. New York Central R. Co., announced while this case was pending in the Court of Appeals.

The Supreme Court's opinion holding this suit to be timely and indicating that plaintiffs are entitled to be paid on the same basis as the plaintiffs in the Abe litigation was announced on April 10, 1967. The undersigned immediately commenced negotiations with Department of Justice attorneys to arrive at a consent judgment for joint submission to this Court. Numerous drafts and discussions culminated in an agreement achieved at a meeting on May 4, 1967 on the ratio of payment and the classes of persons to be eligible for payment under a Consent Judgment and Decree to be submitted to the Court by the parties. A draft Consent Judgment and Decree and motion for same was promptly prepared, and by mutual agreement of the parties furnished informally to this Court in early May. Those documents, with slight procedural and editorial modifications, were formally in this Court on June 15, 1967.

We have recently commenced the effort to locate the maximum number of the more than 6,000 claimants entitled to payment under the proposed Judgment. In that connection, we are utilizing the services of Mr. Mike Masaoka, Washington Representa-

tive of the Japanese-American Citizens League. As a result of discussions at the Department of Justice with Mr. Masaoka, and based on information furnished by him, a schedule of newspapers for publication of advertisements has been established (as reflected in Paragraph 7 of the motion for entry of the consent judgment). In addition to the efforts therein set forth which are to be made through various private and civic organizations, including the Japanese Chamber of Commerce and the Japanese-American Citizens League, the undersigned will expend considerable effort during the remainder of 1967 in locating the maximum number of eligible claimants. Among the possible sources for locating those among the claimants who cannot be found by public advertisement and individual mailings, counsel intend to search records of United States agencies, of individual states wherein there is a high concentration of Japanese-American persons, and in Japan. Some of these proposed steps are set forth in paragraphs 4 and 5 of the letter of May 16, 1967 to Mr. B. S. Atwood of the Department of Justice, a copy of which is attached hereto as Exhitibt A.

> All of the undersigned counsel have expended in the representation of these claimants between two and three thousand working hours. It is expected that many additional hours will be expended prior to the end of 1967 in the efforts set forth above and that the final total will substantially exceed 3,000 hours. Total expenses to date on behalf of the claimants in this litigation are somewhat in excess of thirteen thousand dollars, and it is expected that a like amount may be expended prior to the end of 1967 in the effort to locate as many as possible of the claimants entitled to participate under the Judgment.

* * *

It is submitted on the basis of the foregoing considerations that the fee application made herein is fully justified and fair. The joint motion by the parties for entry of the Consent Judgment and Decree asks that a fee award be made by the Court on principles similar to

those underlying the award in the Abe case, and the award here sought meets that standard in two significant respects:

(1) The amount of the fee sought is substantially less than was awarded in the Abe case and the substantial risks of the litigation, efforts of counsel, and gains to the claimants, cited by the Court in its fee award in Abe are duplicated in the present litigation.

(2) On a percentage basis the fee award sought herein is substantially smaller than in Abe, since the Court there awarded twenty percent of the fund recovered. In view of the ratio of fee to fund in this case we do not believe this Court is required to find the "hardship" under Section 20 of the Trading With the Enemy Act which the Court in Abe found to justify a twenty percent award,[2] but should

[2]Section 20's reference to the property interest or "proceeds to be returned" and "interest vested in the United States" appears to contemplate measurement of the percentage awarded against the fund created by the judgment for the plaintiffs. This comports with the settled equitable principle, applicable to situations of this nature, that one who recovers or establishes a fund for the common benefit of himself and others is entitled to have his costs and expenses borne by that fund.

Eighty-five years ago, the Supreme Court applied what it designated as the "established" principle in Trustees v. Greenough, 105 U.S. 527. There, a bondholder sought the appointment of a receiver for a fund, charging, on behalf of himself and the other bondholders of a railroad company, that the trustees were wasting and destroying the fund. After a favorable judgment, the plaintiff filed a petition for an allowance out of the fund for his expenses. In affirming the substantial award granted the plaintiff, the Supreme Court pointed out that allowances for fees of counsel and the like were commonly made out of the fund in estate matters, in proceedings for restoring property to the uses of a charity, in creditors suits and in bankruptcy cases. Accordingly, the Court ruled that even though some members of the class in the case before it had "not taken the benefit of the litigation", it was only just to require all those "entitled to participate in the benefits of the fund" to contribute to the expenses involved in rescuing that fund. And the Court ruled that "To make them a charge upon the fund . . . is the most equitable way of securing such contribution . . ." Similarly, an award of counsel fees at a

the Court deem it appropriate it is submitted that the totality of circumstances similar to those in Abe would equally warrant such a finding in the present case.

WHEREFORE, it is respectfully submitted that the Court should award the counsel fee sought in this application.

Respectfully submitted,
Joseph L. Rauh, Jr.
John Silard
A. L. Wirin
Fred Okrand
Counsel for Plaintiffs

NO OBJECTION

_____
Counsel for Defendant

VERIFICATION

I swear that the facts represented in the above application are true and correct, to the best of my knowledge and belief.

Joseph L. Rauh, Jr.
John Silard
A. L. Wirin

Sworn to before me and subscribed in my presence this 27th day of of June, 1967.

_____
Notary Public

My commission expires 3/14/1970.

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percentage of the "total overcharge" ordered refunded has been made where many beneficiaries of a class judgment did not ultimately share in the distribution. See Illinois Bell Telephone Co. v. Slattery, 102 F. 2d 28, 61, 65-66.

Sworn to before me and subscribed in my presence this ____ day of June, 1967.

_____

Notary Public

My commission expires _____.

_____

[Filed June 30, 1967]

PETITION FOR AWARD OF COUNSEL FEES

The petition of Thomas H. Carolan and Philip W. Amram respectfully represents:

1. This is an application for the award of counsel fees to petitioners.

2. The Honda case was filed for the sole purpose of securing for the 4,1000 plaintiffs therein (all of whom were depositors of the Yokohama Specie Bank) the same award from the vested assets of the Bank in the possession of defendant, as had been paid previously from those assets to some 1,799 other depositors of the Bank represented by the petitioners. On behalf of the other 1,799 depositors, and on behalf of depositors similarly situated in the Sumitome Bank, petitioners and their associates had conducted seventeen years of litigation through the administrative process in the Office of Alien Property, through this Court and the Court of Appeals of the District of Columbia and through the successful grant of certiorari in the Supreme Court of the United States. The two actions are identified as Abe v. Kennedy, C.A. No. 2529-61 in this Court (the Yokohama Specie Bank depositors) and Aratani v. Kennedy, C.A. No. 3164-58 in this Court (the Sumitomo Bank depositors).

3. Following the grant of certiorari in Aratani, the Abe case was compromised and final judgment was entered by this Court on May 18, 1964. In that judgment, petitioners were awarded, for services rendered in that case, 20% of the fund created by their services and the services of their associates for the 1,799 depositors included in the Abe litigation.

4. Instantly following the judgment in Abe, on the next day, May 19, 1964, the Honda case was filed on behalf of an additional 4,100 depositors of the Bank not included in the Abe litigation.

5. The relief sought in the Honda case was for a treatment of the 4,100 Honda depositors identical to the treatment already accorded the 1,799 Abe depositors out of the same vested assets.

6. The defendant resisted the Honda case on the ground that the statute of limitations barred the action. This Court and the Court of Appeals sustained the defense. The Supreme Court of the United States reversed, in its decision of April 10, 1967, on the ground that the Abe litigation, initiated and carried through by petitioners, had tolled the statute of limitations for the benefit of the Honda depositors.

7. Accordingly, the entire recovery of the 4,100 Honda depositors is founded basically upon the legal services rendered by the petioners to the 1,799 other depositors in the Abe litigation. Plaintiffs in Honda will recover on the merits the same substantive recovery which resulted on the merits from the seventeen years of legal services rendered by petitioners, with no further litigation on the merits by the Honda plaintiffs or their counsel. Further, the Honda plaintiffs will have successfully overcome the bar of the statute of limitations by reliance upon the Abe action brought by petitioners as the basis for tolling the statute for their benefit.

8. Petitioners have been furnished with a copy of a proposed form of consent judgment, agreed to between counsel for the Honda plaintiffs and counsel for the defendants. Petitioners are informed that counsel for the Honda plaintiffs and counsel for the defendant have agreed upon the allowance of a fee of $950,000 for counsel for the Honda plaintiffs. The proposed consent judgment provides, inter alia, for the voluntary inclusion in recovery thereunder of certain other depositors of the Bank, not included in the Honda group and not represented in the Honda action. Petitioners are further informed that the total of the depositors' claims covered by the proposed consent judgment is more than $10,500,000, so that the $950,000 fee payable to counsel for the Honda plaintiffs is less than 10% thereof.

9. Petitioners note that the proposed consent judgment contains in Paragraph 2 a specific provision which appears to be designed to prevent the award of any compensation to petitioners to which petitioners enter their formal objection.

10. Counsel for the Honda plaintiffs are admittedly entitled to payment of the fair value of their services in conducting the Honda case from its inception in 1964, and petitioners do not object to their $950,000 fee. However, petitioners assert that they are likewise entitled to payment of fair and reasonable compensation because of the use of their services in the Abe litigation for the benefit of the Honda and other depositors in overcoming the bar of the statute of limitations and in fixing the amount of recovery on the merits from the vested Bank assets.

11. In the Abe litigation, the petitioners received, by order of this Court and with the approval of the defendant, a fee of 20% of the award to the 1,799 Abe depositors. The fee of counsel for the Honda plaintiffs being less than 10% of the present award, there is

ample room for the payment of fair compensation to petitioners without going beyond the Abe fee formula.

12. Attached hereto are copies of the memoranda setting forth the services rendered by petitioners and their associates in California, as filed in this Court in the Abe action, and on which this Court awarded them 20% of the fund created by their services.

Petitioners therefore respectfully request this Court to award them fair compensation, from the fund before the Court, equal to the fair value of the services rendered by petitioners upon which the plaintiffs herein relied to create the fund from which they and other depositors will realize their ultimate recovery.

/s/ Thomas H. Carolan

/s/ Philip W. Amram

[Certificate of Service Omitted in Printing]

[Filed July 6, 1967]

CONSENT JUDGMENT AND DECREE

This is a class action for declaratory and injunctive relief brought under Section 34(f) of the Trading With the Enemy Act by or on behalf of several thousands of persons denied payment of their debt claims by the Alien Property Custodian and his successor, the Attorney General of the United States. On March 31, 1965, this Court dismissed the Complaint on the ground that it was not commenced within the time set forth in Section 34(f) of the Act. The dismissal of the complaint was duly appealed to the United States Court of Appeals for the District of Columbia Circuit, and following a judgment of affirmance by that Court the United States Supreme Court granted certiorari.

On April 10, 1967 the opinion of the Supreme Court rejected the defense that the untimely filing of this suit barred any recovery or required its dismissal and reversed the judgment of the Court of Appeals and this Court. Thereafter, the attorneys for the plaintiffs and for the defendant have joined in a motion to this Court for the issuance of this Consent Judgment and Decree.

Now therefore, it is hereby ordered, adjudged and decreed:

(1) That subject to the exceptions listed under paragraph (4) below, the Attorney General shall make payment on the following Yokohama Specie Bank yen certificates of deposit claims heretofore filed with the Office of Alien Property under Section 34 of the Trading With the Enemy Act:

a. Claims which were dismissed as abandoned.

b. Claims which were withdrawn.

c. Claims which were received by OAP on or before November 30, 1949, and which were dismissed as untimely filed.

(2) That defendant shall pay out of vested assets of the Yokohama Specie Bank, Ltd., for attorneys' fees in this class action $950,000.00 to Rauh and Silard, 1001 Connecticut Avenue, N.W., Washington, D.C., and Wirin and Okrand, 257 South Spring Street, Los Angeles, California.

(3) That payment on claims qualified under paragraph (1) above shall be made at the conversion ratio of 0.26133 cents per per yen — or if vested assets are insufficient after the payment under paragraph (2) above to permit said conversion ratio, then at such proportinately reduced ratio as the remaining assets will permit within a reasonable period of time after the surrender of the original yen certificates of deposit or, if lost or destroyed, after presentation of satisfactory evidence of such loss or destruction. Payment shall

also be made on yen certificates of deposit which were redeemed for cash or converted to an account in the Bank of Tokyo, Ltd. on or after November 14, 1957 but at a conversion ratio one half cent per yen less than the ratio paid above.

(4) That the Attorney General shall not be required by this decree to make payment on any of the following:

a. On any Yokohama Specie Bank, Ltd., yen certificate of deposit which on or before November 13, 1957 was redeemed for cash or converted to an account in the Bank of Tokyo, Ltd., or otherwise disposed of by any claimant or his successor in interest.

b. On any Yokohama Specie Bank, Ltd. yen certificate of deposit claim to the extent that the claimant, or if deceased, his successors in interest by inheritance, devise, bequest or operation of law, do not meet the eligibility requirements of Section 34(a) of the Trading With the Enemy Act.

c. On any Yokohama Specie Bank, Ltd., yen certificate of deposit, or proof of loss or destruction or redemption or conversion, not submitted to the Department of Justice by July 1, 1968.

(5) That the terms of this Judgment and Decree shall be made provisional and subject to notice to be given by the parties to all known claimants entitled to payment pursuant to this judgment, by individual mailed notification to the last known address and by appropriate public notice, setting forth the terms of this Judgment and Decree and notifying them of their right to be heard by motion or application filed not later than December 1, 1967 in opposition to any provision thereof prior to its final promulgation. The Court retains jurisdiction pending promulgation of the final order herein to modify,

alter, or amend the terms of this Judgment and Decree.

July 6, 1967.

Wm. B. Jones
Judge

I CONSENT:

John Silard
Counsel for Plaintiffs

Irving Jaffe
Counsel for Defendant

[Filed July 10, 1967]

AMENDED PETITION FOR AWARD OF COUNSEL FEES

The amended petition of Thomas H. Carolan and Philip W. Amram respectfully represents:

1. This is an application for the award of counsel fees to petitioners.

2. The Honda case was filed for the sole purpose of securing for the 4,100 plaintiffs therein (all of whom were depositors of the Yokohama Specie Bank) the same award from the vested assets of the Bank in the possession of defendant, as had been paid previously from those assets to some 1,799 other depositors of the Bank represented by the petitioners. On behalf of the other 1,799 depositors, and on behalf of depositors similarly situated in the Sumitomo Bank, petitioners and their associates had conducted seventeen years of litigation through the administrative process in the Office of Alien Property, through this Court and the Court of Appeals of the District of Columbia and through the successful grant of certiorari in the Supreme Court of the United States. The two actions are identified as Abe v. Kennedy, C.A. No. 2529-61 in this Court (the Yoko-

hama Specie Bank depositors) and Aratani v. Kennedy, C.A. No. 3164-58 in this Court (the Sumitomo Bank depositors).

3. Following the grant of certiorari in Aratani, the Abe case ~~was~~ was compromised and final judgment was entered by this Court on May 18, 1964. In that judgment, petitioners were awarded, for services rendered in that case, 20% of the fund created by their services and the services of their associates for the 1,799 depositors included in the Abe litigation.

4. Instantly following the judgment in Abe, on the next day, May 19, 1964, the Honda case was filed on behalf of an additional 4,100 depositors of the Bank not included in the Abe litigation.

5. The relief sought in the Honda case was for a treatment of the 4,100 Honda depositors identical to the treatment already accorded the 1,799 Abe depositors out of the same vested assets.

6. The defendant resisted the Honda case on the ground that the statute of limitations barred the action. This Court and the Court of Appeals sustained the defense. The Supreme Court of the United States reversed, in its decision of April 10, 1967, on the ground that the Abe litigation, initiated and carried through by petitioners, had tolled the statute of limitations for the benefit of the Honda depositors.

7. Accordingly, the entire recovery of the 4,100 Honda depositors is founded basically upon the legal services rendered by the petitioners to the 1,799 other depositors in the Abe litigation. Plaintiffs in Honda will recover on the merits the same substantive recovery which resulted on the merits from the seventeen years of legal services rendered by petitioners, with no further litigation on the merits by the Honda plaintiffs or their counsel. Further, Honda plaintiffs will have successfully overcome the bar of the statute of

limitations by reliance upon the Abe action brought by petitioners as the basis for tolling the statute for their benefit.

8. Petitioners have been furnished with a copy of a proposed form of consent judgment, agreed to between counsel for the Honda plaintiffs and counsel for the defendant. Petitioners are informed that counsel for Honda plaintiffs and counsel for the defendant have agreed upon the allowance of a fee of $950,000 for counsel for the Honda plaintiffs. The proposed consent judgment provides, inter alia, for the voluntary inclusion in recovery thereunder of certain other depositors of the Bank, not included in the Honda group and not represented in the Honda action. Petitioners are further informed that the total of the depositors' claims covered by the proposed consent judgment is more than $10,500,000, so that the $950,000 fee payable to counsel for the Honda plaintiffs is less than 10% thereof.

9. Petitioners note that the proposed consent judgment contains in Paragraph 2 a specific provision which appears to be designed to prevent the award of any compensation to petitioners, to which petitioners enter their formal objection.

10. Counsel for the Honda plaintiffs are admittedly entitled to payment of the fair value of their services in conducting the Honda case from its inception in 1964, and petitioners do not object to their $950,000 fee. However, petitioners assert that they are likewise entitled to payment of fair and reasonable compensation because of the use of their services in the Abe litigation for the benefit of the Honda and other depositors in overcoming the bar of the statute of limitations and in fixing the amount of recovery on the merits from the vested Bank assets.

11. In the Abe litigation, the petitioners received, by order of this Court and with the approval of the defendant, a fee of 20% of the

award of the 1,799 Abe depositors. The fee of counsel for the Honda plaintiffs being less than 10% of the present award, there is ample room for the payment of fair compensation to petitioners without going beyond the Abe fee formula.

12. Attached to the original petition, and incorporated herein by reference, are copies of the memoranda setting forth the services rendered by petitioners and their associates in California, as filed in this Court in the Abe action, and on which this Court awarded them 20% of the fund created by their services.

Petitioners therefore respectfully request this Court to award them fair compensation, from the fund before the Court, equal to the fair value of the services rendered by petitioners upon which the plaintiffs herein relied to create the fund from which they and other depositors will realize their ultimate recovery.

Petitioners further request that the counsel fees to petitioners shall be payable solely out of the residue of the vested assets, in the hands of the defendant, which will not be needed to make full payment, at the rate of $.26133 per yen, to those holders of yen certificates of deposit who appear and authenticate their claims prior to the cut-off date of July 1, 1968 or such later cut-off date as the Court may, by subsequent order, direct. The counsel fees shall be payable, at such time or times following the cut-off date, as the Court may, by subsequent order or orders, direct. This is to assure that the payment of the counsel fees to petitioners shall not, in any manner, reduce the payment to any eligible claimant, who authenticates his claim, below the rate of $.26133 per yen, but that they shall be paid solely out of monies which would otherwise be paid by the office of Alien Property, subsequent to July 1, 1968, into the War Claims

Fund pursuant to the War Claims Act of 1948 as amended, or be paid to others than the claiments herein.

/s/ Thomas H. Carolan
/s/ Philip W. Amran

[Certificate of Service Omitted in Printing]

[Filed July 17, 1967]

EXCERPTS FROM MEMORANDUM IN OPPOSITION TO APPLICATION OF CAROLAN AND AMRAM FOR ATTORNEYS' FEES

* * *

Conclusion

The Carolan-Amram group are entitled to no fee from the YSB fund in compensation for services which they claim to have rendered the Honda class, for these reasons:

1. Applicants have been adequately compensated in Abe for all services actually performed.

2. The Abe-Aratani suits neither raised, litigated or resolved the issues essential to recovery in Honda.

3. In complete and utter disregard of their 700 Honda-type clients, and of the rights of the class as a whole, they did not assert the legal rights of such individuals or class in Abe, nor did they intervene in Honda.

4. No one in the Honda group could come into court and recover on the basis of Abe-Aratani.

* * *

[Filed July 24, 1967]

EXCERPTS FROM REPLY MEMORANDUM IN SUPPORT OF APPLICATION OF CAROLAN AND AMRAM FOR ATTORNEYS' FEES

* * *

F. The Alleged Misconduct of Carolan and Amram.

A deeply troubling and most important aspect of this argument is the charge by the Government of professional misconduct by Carolan and Amram as the principal reason for urging refusal to award a fee.

Consider the following several comments by Government counsel in their Memorandum ot this effect:

P. 3 "Indeed the applicants here, Carolan and Amram, represented approximately 700 of the Honda type claimants but did not assert or present to the court any position which could have benefited them".

P. 9 "Moreover, Honda claimants had not been joined in the earlier suit, although they have been included in a separate count, had Carolan-Amram attorneys chosen to do so."

P. 11 ". . . if the failure and lack of success in the first suit above is equated with the calculated omission of the Honda claimants from the Abe litigation and the failure to include them in the settlement of that litigation." (emphasis supplied)

P. 22 (In the Conclusion)

"3. In complete and utter disregard of their 700 Honda-type clients, and of the rights of the class as a whole, they did not assert the legal rights of such individuals or class in Abe, nor did they intervene in Honda." (emphasis supplied)

Even after seventeen years and all the effort that was examined by Carolan and his associates, it was possible, as Judge Walsh points

out in his Memorandum, to lose the Abe litigation and to fail to reach a successful settlement. The Government, which now so vigorously opposes this fee application, fought the Abe case "tooth and nail" for all that time.

It may be said, perhaps immediately, that to achieve the result achieved in Abe, counsel "must have done something right". It may be that the choices exercised along the way were critical.

The second "four minute mile" is easier, after someone has demonstrated first that it can be done.

The Rauh-Wirin group filed a class action, one day after the order was entered in Abe.

We make the following points which must inevitably flow from that:

1. Since Carolan and Amram were busy winding up the Abe matters at the time the Honda litigation was filed, how can the Government assume so definitely, that Carolan and Amram would not within a reasonable time have filed the action themselves?

2. The class action having been filed, how can the Government say that Carolan-Amram had "complete and utter disregard" for their 700 clients, when (the Rauh-Wirin Honda action having been filed) the rights of the 700 Carolan-Amram clients were now fully protected by the class suit? They needed no independent action by Carolan and Amram.

3. How can the Government be so certain, if the Honda claims had been joined with the Abe claims, instead of following them, that either one of the groups would have recovered more than one cent on the dollar. We have said that Carolan and Amram were successful; the Rauh-Wirin group was successful. Carolan and Amram must have done something right.

We can hardly quote a better authority on this matter than the Supreme Court, again in Honda v. Clark, supra, p. 4326:

> "Since petitioners filed their claim immediately upon settlement of the Abe case, there can be no claim that the course of action they took in any way interferred with the speed or manner in which this litigation was conducted.
>
> "The only arguable difference it might have made had petitioners filed their action immediately upon publication of the schedule is that the Government's willingness to settle the case might have been dampened because the large number of plaintiffs would have made settlement more costly to the total fund."

This is at least nine lawyers' opinion of the handling of the case.

* * *

CONCLUSION

In conclusion, we say again that we have said before. The Government has turned this entire argument into an attack on the professional conduct of counsel, using such polarized words as "calculated omission", "failure to include" and "complete and utter disregard of their . . . clients".

The Government's argument seems to be based upon the premise that, whereas counsel have provided a benefit and are legally entitled to recover, counsel should not recover because of unprofessional conduct toward their clients and their non-clients.

How can the Government ask this Court to "punish" counsel for unprofessional conduct and convict them of it, without a day in Court to present the full facts upon which such a claim can be met?

* * *

[Subscription Omitted in Printing]

[Filed Oct. 25, 1967]

MEMORANDUM

Petitioners Thomas H. Carolan and Philip W. Amram have applied to the Court to award them fair compensation equal to the fair value of the services which they claim that they, as members of the bar of this Court, rendered to plaintiffs and similarly situated persons. They seek to have this award made out of a fund resulting from the vesting in the Alien Property Custodian in 1943 of the assets of the Yokohama Specie Bank, Ltd. They do not ask for any part of that fund which will be necessary to pay the plaintiffs and others similarly situated under the consent judgment entered herein on July 6, 1967, which sum is estimated to be $10,500,000. They seek to be paid out of the residue of the vested assets.[1]

To understand the significance of petitioners' request it is necessary to review briefly this litigation and Abe v. Kennedy, Civil Action No. 2529-61, United States District Court for the District of Columbia.[2] In both actions the named plaintiffs sued on their own behalf and on behalf of all persons similarly situated. The class plaintiffs in each case were several thousand Americans of Japanese ancestry who prior to December 7, 1941 had deposited dollars in Cali-

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[1]This application for attorneys' fees is as set forth in petitioners' Amended Petition for Award of Counsel Fees.

[2]Upon succeeding Robert F. Kennedy as Attorney General Nicholas deB. Katzenbach was substituted as party defendant.

[3]For a more detailed factual statement of the Honda case and the Abe case see: Honda v. Clark, 386 U.S. 484 (1967), Kondo. v. Katzenbach, 123 U.S. App. D.C. 12, 356 F. 2d 351 (1966), Aratani v. Kennedy, 115 U.S. App. D.C. 97, 317 F. 2d 161, modified 323 F. 2d 427 (1963), 228 F. Supp. 706 (1964).

fornia and Washington branches of the Yokohama Specie Bank, Ltd., a Japanese bank. Following the outbreak of war with Japan the American assets of that bank were vested in the Alien Property Custodian[3] pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 1, et seq. In 1946 Congress enacted § 34 of that Act (50 U.S.C. App. § 34) which provided that vested property, or the net proceeds thereof, were to be equitably applied by the Alien Property Custodian to the payment of debts owed by the person who owned such property immediately prior to its vesting in the Custodian. The depositors with the Yokohama Bank were creditors to the extent of their deposits and beginning in 1947 some 7500 claims based on yen deposits were timely filed.

After extensive hearings before an examiner, the Alien Property Custodian in 1957 ruled that the claims were allowable at the rate of 361.55 yen to the dollar. The 7500 claimants were advised of this ruling and were directed to submit within forty-five days their original yen certificates which had been issued by the Bank or, in the event of loss of the certificates, other proofs of the debt owed. The claimants were also advised that if such certificates or other proofs were not submitted within the forty-five days the claims would be dismissed as having been abandoned. The same communication further stated to the 7500 claimants that a schedule of claimants would be drawn up from the names of the persons submitting their certifi-

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[3]By Executive Order No. 9788, the Attorney General in 1946 succeeded to the powers and duties of the Alien Property Custodian. Those powers and duties are exercised and performed through the Office of Alien Property, Department of Justice, in charge of which is a Director. For convenience the terms Alien Property Custodian or Custodian will be used to mean one or all such officers or office.

cates or other proofs and that within sixty days after the issuance of the schedule any aggrieved claimant could file in this Court a complaint for review of the schedule in which action the Attorney General would be the defendant.

1817 claimants submitted, within the prescribed time, original certificates of deposit or other proof. The 4100 claimants who are the plaintiffs in this Honda case, did not submit their certificates or other proofs and they were informed that their claims were denied as abandoned. In 1961 a final schedule was prepared and sent to all claimants, including these 4100 who were not included in the schedule but who were advised that they could within sixty days file a complaint in this Court for a review of the schedule.

In August 1961, Abe v. Kennedy, C.A. 2529-61 was instituted in this Court on behalf of the 1817[4] claimants whose claims had been allowed at the rate of 361.55 yen to the dollar. In the Abe case the plaintiffs claimed that the deposit debts owed them should be paid in dollars at the rate of 23.4 cents for each yen rather than at the rate of 361.55 yen per dollar allowed by the Custodian. A case filed in 1958 by depositors of the Sumitomo Bank raised the same issue. Proceedings in the Abe action were postponed pending the outcome of the earlier case, Aratani v. Kennedy, C.A. 3164-58. In that case this Court granted summary judgment in favor of the defendant. On appeal that judgment was affirmed. 115 U.S. App. D.C. 97, 317, F.2d 161, modified 323 F.2d 427 (1963). After the Supreme Court granted certiorari in Aratani, the Attorney General entered into a compromise settlement with the plaintiffs in both Aratani and Abe. Judge Walsh

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[4]While not material, it is noted that petitioners' petition and amended petition refer to 1799 claimants as being plaintiffs in the Abe action, while petitioner Carolan's memorandum attached to the petition and by reference to the amended petition states that the Abe class action was brought on behalf of 1817 persons.

of this Court on March 17, 1964 entered an interlocutory order approving the compromise and on May 18, 1964 entered a final order. Petitioners Carolan and Amram represented both the Aratani and Abe plaintiffs. As a part of the compromise settlement they were awarded as attorneys fees for themselves and other counsel associated with them $1,279,071.51 from the Yokohama funds and $242,761.99 from the Sumitomo funds, which sums constituted 20% of the consent judgments in Abe and Aratani. Over $11,000,000 remains in the Yokohama fund after payment of the compromise judgment and attorneys' fees in Abe.

On May 19, 1964, this Honda action was brought on behalf of the 4100 Yokohama Bank depositors, whose claims were denied as abandoned by the Custodian in 1961.[5] The plaintiffs sought a declaratory judgment that defendant's dismissal of their claims as abandoned was illegal and that they be paid at the same conversion rate as the plaintiffs in Abe v. Kennedy. Defendant, after answering the complaint, moved to dismiss on the ground that the Court lacked jurisdiction over the subject matter of the action because it was not commenced within sixty days after the Custodian's schedule was mailed to the plaintiffs in August 1961 as required by 50 U.S.C. App. § 34(f). This Court granted that motion and the dismissal was affirmed by the Court of Appeals. 123 U.S. App. D.C. 12, 356 F.2d 351 (1966). The Supreme Court reversed, holding that the statutory scheme of § 34 of the Trading with the Enemy Act required tolling the limitation period during the pendency of the Abe litigation. 386 U.S. 484, 500, 502 (1967).

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[5]When commenced this action was entitled Honda v. Kennedy. Thereafter Nicholas deB. Katzenbach succeeded Robert F. Kennedy as Attorney General and defendant following which Ramsey Clark succeeded Nicholas deB. Katzenbach as Attorney General and defendant herein.

Following the reversal by the Supreme Court a consent judgment was entered in this case on July 6, 1967, upon the joint motion of the plaintiffs and defendant. That judgment and decree provided for payment of the claim at the conversion rate of 0.26133 cents per yen. It also awarded attorneys' fees in the amount of $950,000.00 to plaintiffs' counsel. Petitioners here did not represent the plaintiffs in the Honda litigation and, of course, will receive no part of the $950,000.00 fees. As awarded to counsel of record in this case, the fee will be less than 10% of the amount recovered for plaintiffs, according to the best estimate of counsel for defendant as well as plaintiffs' counsel.

Petitioners by their amended petition for award of counsel fees state that they do not object to the $950,000.00 fee awarded to counsel of record in this case. But they assert that they are also entitled to payment of fair and reasonable compensation "because of the use of their services in the Abe litigation for the benefit of the Honda and other depositors in overcoming the bar of the statute of limitations and in fixing the amount of recovery on the merits from the vested Bank funds." They contend that since the $950,000.00 awarded to Honda counsel of record is less than 10% of the recovery, "there is ample room for the payment of fair compensation to petitioners without going beyond the Abe fee formula." (The Abe fee was 20% of the consent judgment recovery. Aratani v. Kennedy, 228 F. Supp. 706, 709-710 (1964)). Petitioners would have a fee paid to them "solely out of the residue of the vested assets, in the hands of defendant, which will not be needed to make full payment, at the rate of $0.26133 per yen, to those holders of yen certificates of deposit who appear and authenticate their claims prior to the cut-off date" as provided in the consent judgment or by any subsequent order of this Court.

As noted the first ground for petitioners' claim of right to a fee is that their services in the Abe litigation were used in overcoming the bar of the statute of limitations by Honda. They point to the Supreme Court decision and opinion in this case. There the Court said "we hold that the statutory scheme [§ 34] itself requires tolling the limitation period during the pending of the Abe litigation." 386 U.S. at 500. The Supreme Court stated that the model for § 34 of the Trading with the Enemy Act was the Federal Bankruptcy Act and that under the latter a creditor who failed to file a timely claim did not lose all rights; rather such an untimely claim could be paid out of the surplus, if any, remaining in the bankrupt's estate after all timely filed claims had been paid in full. This, of course, could result in the untimely claimant receiving nothing if there were no remaining surplus or in an amount less than that claimed if the remaining surplus was not sufficient to pay the untimely claims in full. Here it appears that the Honda claims can be paid in full at the consent judgment rate because the surplus Yokohama funds will be sufficient to meet such demands. But such is not the case of Honda type claimants to the Sumitomo Bank vested assets. Those assets were exhausted by the Aratani plaintiffs, who like the Abe plaintiffs, filed their action within the sixty day limitation provided in § 34. Aratani v. Kennedy, 228 F.Supp. at 208. Honda type claimants to the Sumitomo assets can recover nothing on their claims.

Since petitioners were counsel of record for the plaintiffs in both the Abe and Aratani case, it is difficult to understand how it can be said that their services in Abe were used by the Honda plaintiffs to toll the statute of limitations. They do not contend that the Abe case was instituted for that purpose. Indeed if they had the Honda plaintiffs in mind it would have been simple to have either stated a second claim in the Abe complaint or to have filed a sepa-

rate action within the sixty day statutory period in which to assert the Honda claims.[6] And there is no showing that petitioners in August 1961, when they filed the Abe complaint, knew that the Yokohama fund would be in excess of the total amount claimed by the 1817 Abe plaintiffs' claims. Thus, even if petitioners were acting to toll the statute for Honda claimants by filing the Abe action, for all they knew the Honda claims would be uncollectible as the claims of the similarly situated claimants to the Sumitomo fund.[7]

Petitioners' contention that their services were used to toll the statute of limitations on behalf of the Honda plaintiffs is without merit.

The second reason advanced by petitioners for awarding them a fee in this case is that through their services in the Abe litigation they benefited the Honda plaintiffs in fixing the rate of recovery from the vested Bank assets. They argue that it was only after the Supreme Court granted certiorari in Aratani that the defendant was willing to settle with the Abe plaintiffs. Petitioners point out that it was the Abe compromise conversion ratio that the qualified Honda class claimants will be paid.

In considering this contention of petitioners it is to be noted first that their services did not create a fund for anyone. The fund resulted from the proceeds of the Yokohama Specie Bank assets. It was the Congress, by enacting § 34 of the Trading with the Enemy

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[6] Carolan and Amram on June 8, 1967, filed in this Honda action their appearance for 712 Honda plaintiffs. These are the claimants for whom Carolan has held powers of attorney for nearly 20 years.

[7] There were 1144 Aratani plaintiffs asserting claims against the Sumitomo vested assets. But, as appears from the Carolan statement attached by reference to the amended petition for award of counsel fees, there were 1985 persons asserting claims as early as 1952 to those funds.

Act in 1946, which recognized that certain creditors had a right to recover from the proceeds of such assets. It was that legislation which both established and has preserved the Yokohama Bank fund for all qualified creditors of that Bank.

Nor can it be said that petitioners have performed any services which in the strict sense resulted in a stare decisis holding. The Aratani-Abe plaintiffs did not obtain a court ruling that the prewar rate of exchange was to be applied in paying the claims of those qualified to receive payment. In an out of court agreement with defendant they compromised their claims. That compromise settlement was approved by Judge Walsh. It was a compromise that paid the Abe plaintiffs 49 per cent (less counsel fees) of the amount they claimed. The action of Judge Walsh was limited to concluding "that the proposed settlement is fair and reasonable to the claimants." Aratani v. Kennedy, 228 F. Supp. 706, 708, 709 (1964).

But even if Judge Walsh's approval of the settlement in Abe were to be considered a stare decisis holding, it would avail petitioners nothing. It has been decided by our Court of Appeals that "[o]ne who is influential in litigation leading to the announcement of a rule of law does not thereby gain a right to compensation from all those who later benefit from the application of that rule." Whittier v. Emmet, 108 U.S. App. D.C. 191, 199, 281 F. 2d 24, 32 (1960), cert. denied, 364 U.S. 935. The most that can be said is that the Honda plaintiffs sought and obtained a consent judgment at an exchange rate that had been applied in the approved Abe consent judgment. Petitioners are not to be compensated for that.

An examination of the authorities cited by petitioners in their memoranda in support of their amended petition do not, under the circumstances of this case, give reason for altering the conclusion reached here.

But to hold that petitioners are not entitled to compensation in connection with this court action does not dispose of the matter of their application for counsel fees. While in the main petitioners in their amended petition for the payment of counsel fees, their memoranda in support thereof, and their oral argument claim a right to compensation here because of their services in the Aratani-Abe litigation, they also assert that their services, together with that of associates, during the administrative proceedings commencing in 1947 entitled them to a fee. In that connection the joint motion of plaintiffs and defendant herein for entry of consent judgment states (1) that defendant conceded before the Supreme Court in this case that the Honda plaintiffs' claims were valid and payable except for their delay of more than 60 days in the filing of this action and (2) that the brief of defendant in the Supreme Court was in essential agreement with plaintiffs' representation before the Court that "[T]here has never been any question about petitioners' [Honda plaintiffs] statutory eligibility for an Alien Property return, which the Government expressly recognized as long back as 1958 * * *."

Incorporated by reference in petitioners' amended petition for counsel fees are copies of two lengthy memoranda by Carolan and a copy of an affidavit of Alfred Gitelson, the originals of which were submitted to Judge Walsh in Aratani v. Kennedy, 228 F. Supp. 706 (1964). Those memoranda and affidavit set forth in considerable detail the legal services Carolan, Gitelson and their associates performed in the administrative proceedings in the Office of Alien Property in connection with claims arising out of deposits made prior to December 1941 with the Yokohama Specie Bank, Ltd. It was in connection with those proceedings that the Honda class claims were recognized as being valid and payable.

Judge Walsh in awarding counsel fees in the Aratani-Abe litigation recognized that the administrative proceedings services of counsel were valuable. In his opinion he referred to 33 attorneys, only two of whom, petitioners here, were counsel of record in the Aratani and Abe cases, 228 F. Supp. at 709. In awarding counsel fees, Judge Walsh ordered that there be paid from the Yokohama Specie Bank, Ltd. account in the Office of Alien Property the sum of $1,036,309.82 to petitioners Carolan and Amram, who in turn were ordered to properly distribute that fee to all other counsel who had participated in the Abe cases and who had counsel fee claims pending. (Abe v. Kennedy, C.A. No. 2529-61, order of March 17, 1964.) Wirin and Okrand, two of counsel of record here, received $20,000.00 of the fee awarded in the Abe case.[8] Those services were rendered in the administrative stage.

Just as Judge Walsh recognized that those administrative proceedings services were of value to the Abe claimants, so are they recognized to be of value to the Honda class of claimants. But in arriving at the 20% fee in the Abe case, Judge Walsh also considered the services rendered in the Aratani-Abe litigation. Here the litigation services of counsel Rauh, Silard, Wirin and Okrand have been recognized and an award has been made to them of $950,000.00 for such services. Petitioners here would have a total of 20% of the Honda recovery awarded as counsel fees, of which they would get approximately 10%. But it has been held here that they are entitled to no fee here for services they rendered in the Aratani-Abe litigation. Thus, the 10% they seek here would be excessive, particularly

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[8]The other two counsel of record in this case, Rauh and Silard, did not participate in the administrative proceedings. Their first services were in connection with this court action.

since their services during the administrative stage would have returned nothing to the Honda claimants if other counsel had not instituted and prosecuted this case. A fee of 5% will be allowed for administrative proceedings service of counsel.

That 5% will be awarded as follows: First, only out of funds remaining in the Yokohama assets after the Honda plaintiffs' claims are paid at the rate of $0.26133 per yen and after the counsel fees in the sum of $950,000.00 have been paid to Rauh, Silard, Wirin and Okrand as awarded in the July 6, 1967 consent judgment entered herein.[9]

Second, the 5% fee will be paid to those counsel who participated in the administrative proceedings.

Third, in determining the actual amount awarded counsel there shall be excluded from the 5% computation the amounts recovered by Honda class claimants who have heretofore given powers of attorney to counsel or have otherwise retained or contracted for the legal services of counsel.[10]

Petitioners and counsel for defendant shall within 10 days submit in writing suggestions as to a method for identifying and notifying all counsel who participated in the administrative proceedings with respect to the Yokohama Specie Bank funds, as well as suggestions as to a method for determining the proportional amount of the fee to be distributed to each one of such counsel.

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[9] In conditioning the 5% award to the residue funds there has been taken into consideration petitioners' amended petition for counsel fees.

[10] In petitioners' reply memorandum filed herein they expressly excluded from their amended petition for an award of compensation any fee in such cases.

After petitioners filed a petition for award of counsel fees on June 30, 1967, they filed an amended petition on July 10, 1967. In ruling as I have above, I took into consideration both.

On July 24, 1967, petitioners filed a motion for leave to file a second amended petition for counsel fees. Attached to the motion is a draft of the proposed second amended petition. Neither the motion nor the proposed second amended petition add anything to what has been considered. The proposed amended petition for the most part is argumentative and repetitious argument. Such facts as it purports to allege have been before the Court through the files and the material appended to petitioners' original petition for award of counsel fees. Petitioners' motion for leave to file a second amended petition will be denied.

/s/ William B. Jones
Judge

October 25, 1967

[Filed Oct. 25, 1967]

ORDER

Petitioners' motion for leave to file seconded amended petition for counsel fees having been considered by the Court together with the reasons asserted by said petitioners and the objections asserted by defendant, it is this 25th day of October, 1967.

ORDERED that petitioners' motion to file second amended petition for counsel fees be and the same is hereby denied.

/s/ William B. Jones
Judge

August 10, 1967

Honorable William B. Jones
Judge of the U. S. District Court
for the District of Columbia
U. S. Court House
Constitution Avenue and
John Marshall Place, N.W.
Washington, D. C. 20001

Re: Ayako Honda, et al. v. Ramsey Clark,
Attorney General of the United States
Civil Action No. 1179-64

Dear Judge Jones:

The provisional Consent Judgment issued in Honda on July 6, 1967 requires notice of the terms of the terms of the Judgment to all affected claimants by November 1, 1967.

We therefore with the consent of petitioners' attorney, John Silard, propose to send the attached explanatory letter and Japanese translation thereof, together with a copy of the Judgment and a return acknowledgment card, to each of the approximately 6,300 claimants. We intend to commence the mailing of these notices initially to claimants who current addresses have been confirmed as soon as the letter and decree can be duplicated.

If you have any objection to the terms of the letter, please let me know at your earliest convenience.

Yours very truly,

Carl Eardley
Acting Assistant Attorney General
Civil Division
Acting Director, Office of Alien Property
By: /s/ Bartlett S. Atwood

Enclosure

DRAFT LETTER TO HONDA CLAIMANTS

On July 6, 1967, a provisional Consent Judgment and Decree was issued by the United States District Court for the District of Columbia which provides for substantial dollar payments on several thousand Yokohama Specie Bank yen certificate of deposit claims on file with the Office of Alien Property.

The Consent Judgment and Decree implements the recent decision of the United States Supreme Court in Honda v. Clark. There the Supreme Court took the position that the holders of yen certificates of deposit who had abandoned or withdrawn their YSB claims should receive payment on their claims on the same basis as that accorded the claimants in Abe. v. Kennedy to the extent that the $11,-000,000 Yokohama Specie Bank fund held by the Office of Alien Property is sufficient to do so. In the Abe case, the Yokohama Specie Bank yen certificate holders received payment from the Office of Alien Property on their yen certificates at the settlement rate of $0.26133 per yen. The rate included both principal and interest.

An examination of the above-numbered debt claim indicates that you may be eligible for payment on your Yokohama Specie Bank yen certificates of deposit of the Abe settlement rate of $0.26133 per yen. This letter is to advise you of the terms of the Court Judgment and the procedures to be followed.

Under the Judgment, payment will be made on claims which were dismissed or abandoned when the original Yokohama Specie Bank certificates were not mailed to the Office of Alien Property as requested in 1958 and 1959. Payment will also be made on claims which were withdrawn after November 13, 1957 when the Office of Alien Property announced that it would pay yen certificates of deposit claims only at the postwar rate of exchange of 361.55 per dollar. In addition, payment will be made on Yokohama Specie Bank yen certificates of de-

posit which have been lost or destroyed or which were redeemed for cash or converted to accounts in the Bank of Tokyo after November 13, 1957. Payment on redeemed and converted certificates will be made at the reduced rate of $0.25633.

Only claims within the above categories which were filed with the Office of Alien Property on or before November 30, 1949 for the recovery of the value of yen certificates of deposit issued by the American and Hawaiian branches of the Yokohama Specie Bank will be considered for payment.

No payment can be made to claimants or the heirs of deceased claimants who are ineligible as debt claimants under Section 34(a) of the Trading with the Enemy Act (50 U.S.C. App. 34). In general, payment can be made only to claimants who have been either citizens of the United States or residents of the United States since December 7, 1941. Section 34(a) prohibits payment to any claimant of the heir of any deceased claimant who was an internee or parolee under the Alien Enemy Act.

Claimants who are found to be eligible will be asked to send their original yen certificates to the Department of Justice during the early part of 1968. If you are an eligible claimant or heir of a claimant within the terms of the Judgment and you do send your original certificate (or evidence that it has been lost or destroyed or cashed or converted with the Bank of Tokyo) upon request next year, to the Department of Justice, you should receive payment as soon as possible on or after July 1, 1968 at approximately 26¢ for each yen or your certificate.

There is attached to this letter of explanation a copy of the Consent Judgment and Decree entered in the Honda case on July 6, 1967 by the United States District Court for the District of Columbia. It is your right by appropriate motion or application made to

the Court not later than December 1, 1967, to object to any provision of the Consent Judgment and Decree with which you disagree. The Consent Judgment will not be made final until after the period for objection has expired.

Please acknowledge receipt of this letter by completing and mailing the enclosed self-addressed postcard at your earliest convenience.

Yours very truly,

Carl Eardley

Acting Assistant Attorney General
Civil Division
Acting Director, Office of Alien Property

Enclosure

[Filed Nov. 27, 1967]

EXCERPTS FROM DEFENDANT'S
EXCEPTIONS AND OBJECTIONS

Defendant objects and excepts to the Court's memorandum herein of October 25, 1967, to the extent indicated below. The Court is respectfully requested to withdraw and vacate that portion of said memorandum that awards counsel fees to the petitioners herein, Thomas H. Carolan and Philip W. Amram. The reason for this request is that the predicate upon which the Court makes such award of fees, namely, that the petitioners established that the Honda class claims were valid and payable in the administrative proceedings before the Office of Alien Property, simply is not true.

The defendant agrees with the Court's conclusion that the petitioners did not institute the Abe-Aratani litigation for the purpose of tolling the statute of limitations for the benefit of Honda plaintiffs

and that petitioners' services were not used by the Honda plaintiffs to toll the statute. The defendant also agrees with the Court's conclusion that the petitioners are not entitled to a fee on the ground that the Honda plaintiffs benefited from their services in the Abe litigation in which the rate of recovery was fixed through compromise.

However, defendant does except and object to the Courts' conclusion that the services of the petitioners during the administrative proceedings commencing in 1947 entitles them to a fee on the assuption that those proceedings were concerned with or established that the Honda plaintiffs' claims or, for that matter, that any claims, were valid and payable. The administrative proceedings in which petitioners participated did not deal with that issue nor could they have.

The administrative proceedings, as the recommended decision of the Hearing Examiner and the decision of the Director disclose, were concerned wholly and solely with one issue, namely, the rate of exchange at which Yokohama Specie Bank and Sumitomo Bank yen certificate of deposit holders would be paid. The Hearing Examiner recommended that claimants be paid at the pre-war rate. The Director of the Office of Alien Property did not accept this recommendation and did not adopt it, but decided that payment be made at the post-war rate. This is the only issue with which the administrative proceedings dealt.

It may be helpful at this point if we define a "valid" debt claim. Section 34 of the Trading With the Enemy Act authorizes the equitable application of seized property to the payment of debts owed by the person who owned such property immediately prior to its seizure. The statute further provides that no debt claims shall be allowed if they were not due and owing at the time of such seizure or, if they arose as a result of a prohibited transaction under the Trad-

ing With the Enemy Act, unless licensed. The person who owned the property involved in this suit at the time of seizure was the Yokohama Specie Bank. The holder of a yen certificate of deposit is a creditor of the Yokohama Specie Bank to the extent of the amount set forth in the certificate. All certificates had been issued prior to the seizure. Hence, on its face, each yen certificate represented a valid debt. The Government never challenged the validity of a yen certificate of deposit as evidence of a debt; hence, it was never in issue and was never litigated administratively or judicially.

Whether or not a debt is payable, however, depends on other factors. For example, Section 34 of the Trading With the Enemy Act prohibits payment, inter alia, to any person who has been convicted of a violation of the Trading With the Enemy Act or of certain other enumerated acts, or to persons who have been interned or paroled pursuant to the Alien Enemy Act. Moreover, debt claims may only be allowed and paid, under the statute, to persons who are citizens of the United States or of the Philippine Islands, or to natural persons who are and have been, since the beginning of the war, residents of the United States. Thus, persons who may own valid debt claims may be ineligible to receive payment. Issues of eligibility, however, involve criteria which must be applied to each individual claimant separately. Many claims had been dismissed on various grounds of ineligiblity or, where it appeared that an otherwise eligible claimant had elected to surrender his certificate of deposit for redemption in yen in Japan. In the latter case no debt existed any longer. But, no part of the administrative proceedings in which the petitioners participated concerned issues of eligiblity and no determinations were ever made in those administrative proceedings concerning either the validity or payability of the debt

claims. Indeed, questions of eligibility, and hence allowability, with respect to the Honda claims must still be resolved.

Whatever representations may have been made to the Supreme Court in the Honda litigation concerning "valid and payable" claims,[1] it is submitted that they did not constitute any concession or admission that the validity and payability of claims had been resolved in administrative proceedings as a result of any services performed by petitioners directed to those issues. There were no such issues in those administrative proceedings.[2] After the Director had ren-

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[1]The Government's brief in the Supreme Court in the Honda case contains no statement that may be construed as an acknowledgment that the Honda claims were valid or payable or that the claimants as a group were eligible to receive payment from the vested property, but for their failure to file timely objection to the final schedule. The brief does state (p. 6): "After the war, those certificates of deposit were recognized as valid and collectible at face value in yen from the Liquidator of the Yokohama Specie Bank in Tokyo, Japan or from that bank's successor, the Bank of Tokyo, Ltd." (underscoring added). The Government did argue that the Honda claimants were barred from recovery because of failure to timely file objections and that the applicability of the statute of limitations was not overcome by any principles of estoppel or by the Fifth Amendment.

It is not known whether any oral representations were made to the Supreme Court during argument. The decision of that Court does not refer to or rely on any representation that validity, payability or eligibility was conceded.

[2]The administrative proceedings before the Office of Alien Property were not class-type proceedings within the meaning of Rule 23, FRCP. It was a consolidated proceeding as permitted by Section 502.12 of the Rules of Procedure for claims of the Office of Alien Property (8 CFR 502.12). A class action was first begun after the conclusion of the administrative proceedings when the Abe-Aratani suits were filed in the District Court. There is thus no basis for awarding these petitioners a fee based on the administrative proceedings and admittedly petitioners rendered no services to the plaintiffs in the current Honda class suit.

dered his decision holding that Yokohama Specie Bank certificate of deposit claims would be payable at the post-war rate, a final schedule of allowed claims was issued some four years later, listing 1817 claims as being valid and payable, of which approximately 700 were represented by petitioners. During those four years, individual claimants, where necessary, submitted proofs of eligibility, etc. No formal administrative proceedings were held. Many otherwise possibly valid and payable debt claims were not included in the final schedule for a variety of reasons: (1) claimants did not surrender their certificates of deposit or proof of loss thereof, and their claims were deemed abandoned; (2) other claimants accepted payments in yen in Japan, after being apprised of the Director's decision, thus erasing the debt; and, (3) still others were found ineligible, or having died, were survived by heirs who were ineligible. Some of these claims have now been revived and are included among the Honda claims. Many of these Honda claimants, perhaps seven to eight hundred, had been represented administratively by the petitioners. These claimants, petitioners' clients, were abandoned by the petitioners, insofar as the Abe litigation was concerned.[3]

It is true, as this Court points out, that the joint motion of the plaintiffs and defendants states that defendant conceded before the Supreme Court that plaintiffs' claims were valid and payable, but the

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[3]There is a simple and understandable reason for such abandonment. The Abe-Aratani litigation was concerned only with the rate of exchange — the sole issue in the administrative proceedings. The rights of Honda claimants to receive payment — at any rate of exchange — were entirely dependent on resolution of issues not raised or presented in or related to the Abe-Aratani issues. The Honda issues were raised in a separate, unrelated, suit by present counsel for plaintiffs and not by petitioners.

remainder of that paragraph in the joint motion (p. 3) places the statement in proper context. The defendant did not question before the Supreme Court, this Court or the Court of Appeals, the validity of the claims. It was not in issue. The defendant resisted recovery by plaintiffs solely on the ground that plaintiffs' failure to seek judicial relief within 60 days after issuance of the final schedule was fatal to their claims. The Government's defense theory would have been equally effective, if successful, even if the claims were valid. The fact is, however, that paragraph (4) of the consent order herein, signed on July 6, 1967, reserves to defendant the right to examine into the eligibility of each claimant and the continuing validity of the debt. This was necessary because it had not been done before. Certainly, the debt validity and eligibility of each Honda claimant were not only not established in the administrative proceedings in which the petitioners participated, but obviously their services in those proceedings could not possibly have benefited the Honda claimants whose eligibility is now first being determined.

* * *

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[Certificate of Service Omitted in Printing]

[Filed Dec. 4, 1967]

EXCERPTS FROM PETITIONERS' RESPONSE TO THE GOVERNMENT'S EXCEPTIONS AND OBJECTIONS

* * *

The essence of the Government's position is that the Carolan-Gitelson group rendered no services in the administrative proceedings which benefited the Honda claimants. This position can be explained only on the basis that counsel who now represent the Gov-

ernment did not participate in those proceedings, which began twenty years or more ago, and are therefore not familiar with what happened. For example:

(1) In the Reply Memorandum of Petitioners filed prior to this Court's opinion, it was noted on page 5 that Mr. Carolan's services included:

> "obtaining late-filing authority which permitted the filing of 57 percent of all claims, and resisting the Government's attempts to obtain legislation which would bar the claims altogether."

The Government carefully avoids a denial of these statements, and makes no reference to these services.

The facts are that all Yokohama Specie Bank claims, including all Honda claimants, were subject to a filing deadline of August 8, 1948. The Government sought to dismiss all claims filed after that date and Mr. Carolan, entirely alone, sought and secured from Honorable David Bazelon, then the Alien Property Custodian, an Order extending the filing deadline from August 8, 1948 to November 19, 1949.

The last Yokohama Specie Bank claim number filed by August 8, 1948 was No. 39533, so that every claim bearing a filing number subsequent to this was permitted to be filed only as the result of Mr. Carolan's services.

In the Abe litigation, 59.7% of all the Abe claims finally paid by the Government were filed after the August 8, 1948 deadline. As to the 712 Honda claimants for whom Mr. Carolan had retainer agreements, whose names and claim numbers have been previously submitted to the Court, it appears that 62.77% thereof were filed subsequent to August 8, 1948. There is no reason to assume that any lesser percentage of the remaining 5700 Honda claims was filed after the deadline.

Every such late-filing Honda claimant owed his right to participate in the Honda proceedings in the Supreme Court solely because of the services of Mr. Carolan in securing the extension of time for his benefit.

(2) Sometime in 1955 or 1956 (the exact date can be ascertained only by an exhaustive examination of the records) Mr. Carolan negotiated with the Department of Justice a separate agreement which permitted any claimant to submit proof of loss or destruction of a Yokohama Specie Bank certificate by simple affidavit.

(3) The Department of Justice, in an effort to bar all Yokohama Specie Bank claimants from any recovery, introduced several bills in the Congress for this specific purpose. Mr. Carolan, for the benefit of every claimant, vigorously and successfully opposed this legislation. The facts appear in the following extracts from the colloquy between Judge Walsh and the late Mr. Armand Dubois, of the Department, who was then counsel for the Government in the Abe proceedings:

> "THE COURT: Now, the rule pertaining to the attorney fees is ten per cent except in extraordinary circumstances?
>
> * * *
>
> Now, directing your attention to the extraordinary circumstances, did you consider in the extraordinary circumstances those matters that were not purely legal, that is, legal in a sense of court procedure or administrative procedure?
>
> Did you also take into consideration the efforts, the work performed by counsel in the legislative field?
>
> MR. DuBOIS: No, I would say —
>
> THE COURT: In other words, the Department of Justice, were the originators, were they not, of

certain legislation at different times, to submit to Congress, wiping out the claims of all the claimants in this particular case?

MR. DuBOIS: Yes, at one time bills were introduced which would have excluded from Section 34 all claims expressed in a foreign currency. If that act had passed, these claims would have been excluded.

THE COURT: Do I make myself clear, that when you consider and weigh the discussions pertaining to legal fees, did you recognize the fact that counsel had done everything in their power and within their abilities to bring to the attention of the legislators the merits of their particular claimants?

MR. DuBOIS: I would say we were more concerned with the work that they had done at the hearings of the claims, before the hearings of the Office of Alien Property, and in litigation, the length of time, in making this commitment that we would not object to these under 20 per cent, fixed by this Court.

It was the work they had actually done in the processing of the claims and in the litigation before this office. I don't recall that particular consideration was given to the legislative work.

But it is true, as Your Honor has stated, that that bill was introduced by the Department, and that these counsel did oppose it. I know that of my own knowledge. But I can't say that that was particularly considered at the time of these negotiations."

(4) In the Supreme Court's opinion in Honda (US , 87 S. Ct. 1188 at page 1196), Justice Harlan referred to the Government's position in that case with respect to the Abe proceedings. He said:

" . . . the named plaintiff was also Kunio Abe whose case was cited by the Government as dispositive of petitioners' (the Honda claimants) claims. (Emphasis and parenthesis added.)

(5) As stated by Mr. Justice Harlan in his opinion (p. 1191), the Office of Alien Property in 1958 sent to every claimant, including apparently all the Honda claimants, a notice asking them to send in their certificates for payment at the postwar trifling rate. No Honda claimant could have received such a notice if his claim was not then open on the books of the Department of Justice as a presumptively valid claimant. And no Honda claimant could have been on those books at that time in the absence of the services theretofore rendered by the Carolan group.

(6) Finally, the whole thrust of the Government's exceptions is that the only services for which Petitioners are entitled to be paid are those which may have established the eligibility of each Honda claimant. This is not correct. The services in the administrative proceeding comprehend the totality of the services so rendered which are much too extensive to be established in this brief memorandum, some of which, however, have been listed above. It is this totality of services for which we understand this Court has decided that compensation should be paid.

* * *

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Filed Dec. 5, 1967]

MEMORANDUM OF PETITIONERS RE IDENTIFICATION OF COUNSEL AND DIVISION OF FEES

The opinion of the Court dated October 25, 1967 directs counsel to:

> "submit in writing suggestions as to a method for identifying and notifying all counsel who participated in the administrative proceedings with respect to the Yokohama Specie Bank funds, as well as suggestions as to a method for determining the proportional amount of the fee to be distributed to each one of such counsel."

This Memorandum is filed in response to that directive.

In connection with the identification of counsel who participated in the administrative proceedings and who may therefore have some right to some share in the fees, the transcript of proceedings before George W. Carr, Hearing Examiner, in Kunio Abe et al., Docket No. 55-D 72, lists appearances for claimants as follows:

> Carolan & McHugh
> by Thomas N. (Sic) Carolan
>
> Gitelson, Ashton, Morre & Coyle
> by Robert R. Ashton

The subsequent decision by Hearing Examiner Carr dated January 31, 1957, in Kunio Abe on page two recites:

> "The Chief of the Claims Section is represented by David M. Williford, Trial Attorney. The claimants are represented by the law firms of Carolan & McHugh of Washington, D.C. and Gitelson, Coyle, Cooper & Savitch of Los Angeles, California. A brief amicus curiae was filed by the law firm of Wirin, Rissman & Okrand of Los Angeles, California on behalf of other claimants in a situation similar to that of the claimants in this proceeding."

On or about March 1, 1957, the Chief of the claims section of OAP filed exceptions to the Proposed Decision of Examiner Carr and on page five thereof made the following assertion:

> "At the hearings the claimants were represented by Thomas Carolan of Carolan and McHugh of Washington, D.C., and by Robert R. Ashton of

Gitelson, Ashton, Moore & Coyle of Los Angeles, California."

As stated above, the Wirin firm filed a brief amicus curiae with the Hearing Examiner.

On the face of the record in the administrative proceedings, it is clear that no one except the Carolan, Gitelson and Wirin firms ever participated in the administrative proceedings on behalf of the claimants therein.

Based on the narrative statements filed with him by Messrs. Gitelson and Carolan, Judge Walsh in his memorandum and Final Order of May 18, 1964, in Abe, et al matters, recited that 33 attorneys had participated directly in the named actions. He was referring, of course, both to counsel who participated in the administrative proceedings and counsel who participated in the proceedings in the District Court, the Court of Appeals and the Supreme Court.

All but 8 of the 33 attorneys mentioned were, in fact, former partners or employees of the Carolan and Gitelson firms.

As to the Gitelson firm, the facts are as follows:

Robert R. Ashton, Alfred Gitelson and Goodwin J. Knight, in 1947, formed the law firm of Knight, Gitelson and Ashton. Goodwin J. Knight subsequently became Governor of California and withdrew from the firm. The name was then changed to Gitelson, Ashton, Moore & Coyle. On or about April 1, 1946, Robert Ashton retired from the firm and the name of the firm was changed to Gitelson, Coyle, Cooper & Savitch. However, Robert R. Ashton together with Thomas H. Carolan, worked on the preparation of the opening brief filed with the OAP under the names of Carolan and McHugh and Gitelson, Ashton, Moore & Coyle. Ashton is dead.

Alfred Gitelson in his affidavit of January 20, 1964, in support of application for allowance of attorney fees in the Aratani-Abe liti-

gation, stated that he had paid Goodwin J. Knight and Robert R. Ashton for their respective interests in the partnerships upon their withdrawal and succeeded to all the assets and liabilities of the firms, including compensation for services rendered in connection with the yen deposit claims. In said affidavit Mr. Gitelson named members or associates of his firm who had from time to time performed services in connection with the yen deposit claims. In addition to himself, the following twenty persons were designated:

1. Goodwin J. Knight
2. Robert R. Ashton
3. Newton Kalman
4. Oliver Wyman
5. Max Goldenberg
6. Stanley Carden
7. Paul Mason
8. Alfred Lubin
9. Adel Springer
10. Leonard Low
11. Mr. Fenston
12. Leon Savitch
13. Joseph Stone
14. Dorothy Kendall
15. Mr. Mise
16. Meyer Berkowitz
17. Allen Nixon
18. David Turner
19. Edward B. Olsen
20. Jerry Dunn

Including Alfred Gitelson, this makes a total of 21 attorneys in the Gitelson group.

As to the Carolan firm, the facts are as follows:

Mr. Carolan was from January 1, 1949, until October, 1949, a member of the firm known as Haile, Carolan and Fowler. Edgar Fowler never performed services for yen deposit claims and was not to participate in costs or fees in connection therewith. This situation also applied to Donald P. McHugh, who was associated with Petitioner under the firm name of Carolan & McHugh from 1953 to 1959. Charles A. Haile, who was associated with Petitioner, Thomas H. Carolan, from 1946 until 1953, when the partnership was dissolved, did render services to the yen deposit claimants and was paid a portion of the fee retained by Carolan in the Abe-Aratani litigation.

Including Mr. Carolan, this makes a total of 4 attorneys in the Carolan group.

The 8 remaining attorneys, out of the 33 mentioned by Judge Walsh, are:

> Philip W. Amram, who did not enter the case until after the administrative proceedings were completed;
>
> Messrs. Wirin, Ross and Okrand, above mentioned;
>
> Joseph A. Roney, Esq. who assisted Mr. Carolan in matters in Washington during the administrative proceedings;
>
> Messrs. Roger Brooks, James Parker and Shiro Kashiwa, who never had anything to do with the Yokohoma Specie Bank Case (Abe) but represented claimants in the Sumitomo Bank Case (Sumiyoshi). Further, they never participated in any manner in the administrative proceedings, but entered the Sumitomo Bank Case when it reached the District Court level.

Petitioners therefore state that, to the best of their knowledge and information, no attorneys participated in the administrative proceedings in the Yokohama Specie Bank Case except:

> (a) Mr. Gitelson and one or more of his 20 partners and associates;
>
> (b) Mr. Carolan and one or more of his 3 partners;
>
> (c) Wirin, Ross and Okrand;
>
> (d) Mr. Roney.

Petitioners have received no information as to whether Wirin, Ross and Okrand, having received a fee of $950,000.00 in this matter jointly with Messrs. Rauh and Silard will make a claim to a share of the fees to be awarded to Petitioners. Petitioners urge the Court to deny any such claim, if made.

In the distribution of the fees allowed in the Aratani-Abe litigation, amounting to $1,236,199.59, Judge Walsh did not assume the

burden of determining the respective share of any of the 23 former partners or associates of Messrs. Carolan or Gitelson. This would have been particularly difficult in the light of the fact that almost all of them are Californians, and travel to Washington for the determination of this question would have been an unnecessary burden.

Instead, Judge Walsh awarded the fees directly to Messrs. Carolan and Amram, placing upon them personally, as officers of the Court, the responsibility of meeting any claim by Mr. Gitelson or any other attorneys for any share in the fees.

Petitioners suggest the same procedure here, the fees in this case aggregating less than 50% of the fees awarded in the Abe-Aratani litigation.

Petitioners propose that Mr. Roney receive a fee of $3,000.00 for his services, and that the residue be awarded in equal one-half shares to Messrs. Gitelson and Carolan, with Mr. Gitelson to be responsible for the claims, if any, of his 20 former partners and associates listed on page 3 and with Mr. Carolan to be responsible for the claims, if any, of his 3 former partners listed on pages 3-4.

Respectfully submitted,

/s/ Thomas H. Carolan

/s/ Philip W. Amram

Petitioners

[Certificate of Service Omitted in Printing]

[Filed Dec. 5, 1967]

MEMORANDUM OF PETITIONERS WITH RESPECT TO EXCEPTIONS OR OBJECTIONS TO THE COURT'S OPINION

Petitioners understand the Opinion and Order of the Court dated October 25, 1967 to award to the Petitioners a fee as follows:

5% of $10,500,000.00	$525,000.00
Less 5% of $1,282,200.00 (the face amount of the 712 claims on which the Carolan group holds powers of attorney)	64,110.00
Net fee to be awarded	$460,890.00

If this understanding is correct, Petitioners do not except or object to the decision of the Court fixing that amount of compensation, limiting the payment of that compensation out of the residue of the vested assets, and confining that compensation to those counsel and for those services rendered in the administrative proceedings.

Petitioners do suggest that, in the Final Order of the Court, it would be preferable to state a fixed fee in dollars rather than in terms of percentage formulae, to avoid the possibility of further litigation a year or more from now, when the payments to Honda claimants and to Messrs. Rauh, Silard, Wirin and Okrand have been made, and the fees to Petitioners have become payable.

Petitioners also respectfully suggest the possibility of an alternative approach which may be more attractive from the pointof view of the 712 claimants noted above. Under the Court's opinion, those claimants would, after receiving their awards from the Commission, have a contractual commitment to pay 10% of the amount so received to the Carolan group, under the existing powers of attorney outstanding.

It would clearly be beneficial to the 712 claimants if they could be relieved of this 10% obligation. The Court could accomplish this by modifying its prior opinion by amending subsection "third" on page 12 of the opinion by including the 712 claimants in the 5% fee allowed and simultaneously cancelling the 10% contractual commitment.

This would change the net fee set forth above by increasing it from $460,890.00 to $525,000.00 net, payable out of the residue of assets only and not out of the recovery of any of the claimants. This would likewise require the Carolan group to waive all claims against any of the 712 claimants for the 10% fee provided in the existing contracts.

Petitioners will be satisfied with whichever of these alternatives the Court finds more acceptable.

Petitioners are informed that the Department of Justice intends to file formal exceptions and objections to the Opinion of the Court dated October 25, 1967, for the purpose of denying the Petitioners any fee whatever. Petitioners respectfully urge the Court to dismiss those exceptions, and to award the Petitioners a fixed fee of either $460,890.00 or $525,000.00, subject to the conditions set forth in the Opinion of October 25, 1967, and subject to appropriate provisions for the identification of, and payment to, counsel entitled to share therein.

Petitioners respectfully request that the Final Order of the Court shall provide that the fees as fixed by the Court shall be paid by the Defendant as promptly as possible after July 1, 1968, out of the residue of funds which will remain in the hands of the Defendant after setting aside all funds necessary to pay the fees of $950,000.00 awarded to Messrs. Rauh, Silard, Wirin and Okrand and to satisfy all possibly qualified claims which will have been filed on or before July

1, 1968, the deadline fixed in this Court's Consent Judgment and Decree dated July 6, 1967.

Respectfully submitted,

Thomas H. Carolan

Philip W. Amram

Petitioners

[Certificate of Service Omitted in Printing]

[Filed Apr. 30, 1968]

EXCERPTS FROM OPINION OF COURT GRANTING COMPENSATION TO LEGAL COUNSEL AND OVERRULING OBJECTION OF DEFENDANT TO PAYMENT OF SUCH FEES.

* * *

IV

Under date of October 25, 1967 there was filed herein this Court's Memorandum which dealt with the claim of petitioners Carolan and Amram for counsel fees. The claim of those petitioners for fees for legal services in connection with this litigation was denied. However, it was recognized that legal services rendered during the administrative stage of the Honda class claims should be reimbursed. Petitioners and counsel for the defendant were directed to submit, within 10 days of the filing of the Memorandum, written suggestions as to a method for identifying and notifying all counsel who participated in the administrative proceedings with respect to the Yokohama Specie Bank funds, as well as suggestions as to a method for determining the amount of the fee to be distributed to each such counsel.

Such suggestions were not submitted. Instead defendant has filed objections to any award of fees to any counsel for services rendered in the administrative procedures.[8] Defendant asserts that there were no administrative proceedings so far as the Honda claimants were concerned; that the only such proceeding was with respect to Kunio Abe's contention that the claims should be paid at the prewar (World War II) yen-dollar rate of exchange rather than at the postwar rate. But in making such an argument the defendant overlooks other administrative steps required or made necessary by his predecessor, the Alien Property Custodain.

Attached to their petition for a fee were copies of statements of services rendered by petitioner Carolan. Those statements of services show that Carolan began in July 1947, in association with others, including Alfred Gitelson of Los Angeles, California, representing claimants to the Yokohama Specie Bank fund. This work entailed preparation and filing of a large number of claims, conferences with the Office of Alien Property Custodian concerning the requirements of that Office, obtaining an extension of the time for filing claims, and successfully opposing legislation introduced at the behest of the Department of Justice which, if enacted, would have eliminated all debt claims against Japanese Banks.

In the Abe case, (228 F. Supp. 706) Carolan, Gitelson and other counsel who had represented claimants to the Yokohama Specie Bank fund filed statements of their services in the administrative stages. The extent of such services varied between the several counsel.

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[8]Of course defendant does not object to this Court's refusal to allow counsel fees in connection with the litigation stage to any one other than counsel of record, i.e. Messrs. Rauh, Silard, Wirin and Okrand.

Judge Walsh in the Abe case recognized that those services were valuable. In fact it was because of such services as well as the legal services in the litigation phase that he allowed counsel 20% of the total payment. In his order awarding attorneys' fees he provided that petitioners here, Carolan and Amram, should be paid the total fee awarded and that they should make proper distribution "to all other counsel who have participated in this case and who have claims for counsel fees pending."

As in the Abe case, so here the legal services of counsel who participated in the administrative proceedings should be compensated, even though they did not institute this action or participate in the litigation phase of this case. There would have been no litigation if claims had not been filed, the time extended for filing claims, the legislation defeated which otherwise would have eliminated the claims and other administrative steps taken.

Defendant's objections to the payment of such fees are overruled. In order to properly distribute the attorneys' fees hereinafter defined, the Office of Alien Property of the Department of Justice shall ascertain from its records and files the names and addresses of all counsel who have appeared for any claimants coming within the Honda class and it shall, by mailing to such counsel at their addresses of record, give notice of this ruling of the Court. Any counsel who desires to assert a claim for his services during the administrative stage of the Honda class claims shall file, on or before October 1, 1968, with the Clerk of this Court a petition asserting such claim. This Court will thereafter determine whether those claims will be referred to a Master for hearings, finding, conclusions and report to the Court.

The total amount that will be paid on such claims for such counsel services shall in no event exceed 5% of the total amount paid on

the claims of those Honda class claimants who have not heretofore given powers of attorneys to counsel or have not otherwise retained or contracted for legal services of counsel. The fact that a counsel has a contractual right for payment by his client will not necessarily exclude him from further payment on a petition filed herein but the same will be taken into consideration as to whether he is entitled to be paid from the 5% fund a fee and the amount thereof.

Any counsel fees awarded shall only be paid out of funds remaining in the Yokohama Specie Bank vested assets after all the Honda class claims are paid, in accordance with the final consent judgment and decree and after counsel fees in the sum of $950,000.-00 have been paid to Rauh, Silard, Wirin and Okrand as ordered to be paid in the March 5, 1968 order of this Court.

/s/ William B. Jones
Judge

[Filed Apr. 30, 1968]

ORDER

On October 25, 1967 this Court having entered a Memorandum treating with the application of Thomas H. Carolan and Philip W. Amram for award of attorneys' fees, having considered the objections thereto filed by the defendant, and having entered a written Opinion treating with said objections, it is the 30th day of April, 1968,

ORDERED, that the objections of the defendant be and the same are hereby overruled, and it is,

FURTHER ORDERED,

(1) That the defendant shall ascertain from the records and files of the Office of Alien Property of the Department of Justice

all counsel who participated in this case at the administrative level on behalf of claimants coming within the Honda class, and give notice to them of the ruling of this Court;

(2) That counsel desiring to assert a claim for services during the administrative stage shall file on or before October 1, 1968 with the Clerk of this Court a petition asserting said claim;

(3) That the total amount to be paid on said claims of counsel shall not exceed 5% of the total amount paid on the claims of the Honda class claimants who have not heretofore given powers of attorneys to counsel or have not otherwise retained or contracted for legal services of counsel;

(4) That this contractual arrangement referred to in paragraph (3) above will not necessarily exclude counsel entitled to fees under said contracts from further payment pursuant to a petition filed herein, but the same will be taken into consideration in determining whether counsel is entitled to be paid from the 5% fund and if so, the amount thereof;

(5) That any counsel fees awarded under the Memorandum of October 25, 1967 and the Opinion and Order of this date shall only be paid out of the funds remaining in the Yokohama Specie Bank vested assets after all the Honda class claims are paid in accordance with the final Consent Judgment and Decree entered in this case on this date, and after counsel fees in the sum of $950,000.00 have been paid to Rauh, Silard, Wirin and Okrand as ordered to be paid in the March 5, 1968 Order of this Court;

(6) That in the event this Court deems it necessary and appropriate, all claims filed by counsel who appeared during the administrative stage on behalf of claimants coming within the Honda class

will be referred to a Master for hearings, findings, conclusions and report to this Court.

/s/ William B. Jones
Judge

[Filed Apr. 30, 1968]

CONSENT JUDGMENT AND DECREE

This is a class action for declaratory and injunctive relief brought under Section 34(f) of the Trading With the Enemy Act by or on behalf of several thousands of persons denied payment of their debt claims by the Alien Property Custodian and his successor, the Attorney General of the United States. On March 31, 1965, this Court dismissed the complaint on the ground that it was not commenced within the time set forth in Section 34(f) of the Act. The dismissal of the complaint was duly appealed to the United States Court of Appeals for the District of Columbia Circuit, and following a judgment of affirmance by that Court the United States Supreme Court granted certiorari.

On April 10, 1967 the opinion of the Supreme Court rejected the defense that the untimely filing of this suit barred any recovery or required its dismissal and reversed the judgment of the Court of Appeals and this Court. Thereafter, the attorneys for the plaintiffs and for the defendant joined in a motion for the issuance of a Consent Judgment and Decree.

A Consent Judgment and Decree was entered by this Court on July 6, 1967. The terms of the Judgment and Decree were made provisional and subject to notice to be given by the parties to all known claimants entitled to payment pursuant to the Judgment, by individ-

ual mailed notification to the last known address and by appropriate public notice, setting forth the terms of the Judgment and Decree and notifying them of their right to be heard by motion or application filed not later than December 1, 1967 in opposition to any provision thereof prior to its final promulgation.

After all objections to the Judgment and Decree were filed March 4, 1968 was set as the date for hearing oral argument on all objections and mailed notification thereof was given by the Clerk of this Court to all counsel of record in the case. At the conclusion of the hearing all objections filed were taken under advisement and have now been disposed of by this Court in a written opinion and order.

No objection having been noted to paragraph (2) of the Judgment and Decree allowing attorneys' fees in the amount of $950,000.00 to be paid out of the vested assets of Yokohama Specie Bank, Ltd., to plaintiffs' counsel, Rauh, Silard, Wirin and Okrand, a separate order was entered on March 5, 1968 granting the fee. Therefore, this paragraph will be deleted from the final Judgment and Decree. Due to considerations expressed in the written opinion of this Court paragraph (4)(a) of the provisional Judgment and Decree will be modified to conform thereto and will appear as paragraph (3)(a) herein. Accordingly, it is

ORDERED, ADJUDGED AND DECREED:

(1) That subject to the exceptions listed under paragraph (3) below, the Attorney General shall make payment on the following Yokohama Specie Bank yen certificates of deposit claims heretofore filed with the Office of Alien Property under Section 34 of the Trading With the Enemy Act:

a. Claims which were dismissed as abandoned.

b. Claims which were withdrawn.

c. Claims which were received by the Office of Alien Property on or before November 30, 1949, and which were dismissed as untimely filed.

(2) That payment on claims qualified under paragraph (1) above shall be made at the conversion rate of 26.133 cents per yen-or if vested assets are insufficient after the payment under this Court's order of March 5, 1968 granting attorneys' fees to Rauh, Silard, Wirin and Okrand in the sum of $950,000.00 to permit said conversion rate, than at such proportionately reduced rate as the remaining assets will permit within a reasonable period of time after the surrender of the original yen certificates of deposit or, if lost or destroyed, after presentation of satisfactory evidence of such loss or destruction. Payment shall also be made on yen certificates of deposit which were redeemed for cash or converted to an account in the Bank of Tokyo, Ltd. on or after November 14, 1957 but at a conversion rate of 25.633 cents per yen.

(3) That the Attorney General shall not be required by this decree to make payment on any of the following:

a. On any Yokohama Specie Bank, Ltd. yen certificate of deposit which on or before November 13, 1957 was redeemed for cash or voluntarily and knowingly converted to an account in the Bank of Tokyo, Ltd., or otherwise disposed of by any claimant or his successor in interest, provided, however, that a claimant or successor in interest who alleges involuntary and unknowing conversion shall have the burden of establishing such involuntary and unknowing conversion by a preponderance of the evidence.

With respect to any such eligible claimant who is not represented by other counsel, the class attorneys, Rauh, Silard, Wirin and Okrand, shall, upon request, provide representation without compensation in addition to that awarded counsel under order of March 5, 1968.

With respect to the issue of voluntariness and knowledge of conversion, the Court will retain jurisdiction to review any adverse decision made by the Attorney General or his delegatee.

In the event that any claimant or his successor in interest establishes by a preponderance of the evidence that his yen certificate of deposit was involuntarily or unknowingly converted then he shall be paid at a conversion rate of 25.633 cents per yen.

b. On any Yokohama Specie Bank, Ltd. yen certificate of deposit claim to the extent that the claimant, or if deceased, his successors in interest by inheritance, devise, bequest or operation of law, do not meet the eligibility requirements of Section 34(a) of the Trading With the Enemy Act.

c. On any Yokohama Specie Bank, Ltd., yen certificate of deposit, or proof of loss or destruction or redemption or conversion, not submitted to the Department of Justice by October 1, 1968.

April 30, 1968.

/s/ William B. Jones
Judge

I CONSENT:

/s/ John Silard
Counsel for Plaintiffs

/s/ Irving Jaffe
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE T. ARATANI, 700 South Leonard Ave., Los Angeles 27, Cal.; FUMIKO YOSHIHARA, 2825 E. St., San Diego, Cal.; DR. SHIGEICHI OKAMI, 1501 West 19th St., Long Beach 10, Cal.; YOSHIMATSU MINAMI, 1725 East Stowell Rd., Santa Maria, Cal.; MRS. MINEYO OKUDA, Rt. 1, Box 326, Livingston, Cal.; HATSUTO YAMASHITA, 900 East 195th St., Gardena, Cal.; RIICHI BABAMOTO, 11818 Iowa Ave., West Los Angeles, Cal.; MRS. MOTOYE HATANAKA, 16420 S. Bloomfield Ave., Norwalk, Cal.; NOBUICHI MIYASHITA, 1029 Geln Ave., Pasadena 3, Cal.; SHICHIRO OGOMORI, 539 East 21st St., Los Angeles 11, Cal.; for themselves and for the 1134 others similarly situated,

Plaintiffs

v.

WILLIAM P. ROGERS, Attorney General of the United States, Department of Justice Bldg., Washington 25, D. C.

Defendants

Civil Action
No. 3164-'58

COMPLAINT FOR REVIEW OF DECISION
OF DIRECTOR OF ALIEN PROPERTY

1. Jurisdiction is founded upon the provisions of Section 34(f) of The Trading With the Enemy Act, as amended. (50 U.S.C., APP)

2. These plaintiffs bring this action on their own behalf and on behalf of the 1134 other persons similarly situated whose names are listed under "Priority (4)" in the Office of Alien Property Final Schedule in the matter of the insolvent account of The Sumitomo Bank, Ltd., dated October 24, 1958 under the title "Bank Deposits". This action is brought because:

(a) The number of plaintiffs, 1144, is too large to permit them all to join;

(b) the question of fact and law as to every one of the 1144 plaintiffs is identical;

(c) every one of the 1144 plaintiffs has an identical claim against the specific fund involved in this action, based upon identical written documents, issued by the Bank, differing only in date, name of depositor, and amount and rate of interest;

(d) the maximum amount recoverable by many of the plaintiffs is less than $250 each, so that the cost of an independent complaint for review by each of the 1144 plaintiffs would be oppressive;

(e) the ten named plaintiffs herein, whose claims in the aggregate amount exceed 15% of the total amount claimed by all the priority (4) claimants listed in said Final Schedule under the title "Bank Deposits", can and will adequately represent all the 1144 priority (4) claimants listed in said Final Schedule under the title "Bank Deposits".

3. The defendant, William P. Rogers, is sued herein in his official capacity as Attorney General of the United States.

4. Pursuant to Vesting Orders of the Alien Property Custodian issued in 1943, certain assets and properties of the Sumitomo Bank, Ltd., a Japanese corporation engaged in business in the United States, were vested under The Trading With the Enemy Act, as amended.

5. The United States now holds approximately $1,050,000.00 in cash as the proceeds of the liquidation of the vested property.

6. The 1144 plaintiffs, above identified, all held identically worded Yen Certificates of Deposit issued to them in the United States in exchange for the deposit of dollars in the said bank. Said certificates were cashable or redeemable upon demand at any time in dollars at the office of the Bank in the United States or in Yen at the office of the Bank in Japan.

7. The 1144 plaintiffs all filed timely debt claims under Section 34 of The Trading With the Enemy Act, as amended.

8. The said claims were duly heard before George W. Carr, a hearing examiner of the Office of Alien Property, who, on Janu-

ary 31, 1957, recommended to the Director of the Office of Alien Property that all of said claims of the said 1144 plaintiffs be allowed in dollars at the rate of exchange of 23.4 cents for each Japanese Yen face amount recited in the Certificate of Deposit with interest thereon from date of deposit to December 8, 1941, at the rate of 3.3 per cent per annum.

9. On November 13, 1957, the Director of the Office of Alien Property issued his decision confirming the allowance of the claims of the said 1144 plaintiffs, but reducing the amount thereof to an amount in dollars equal to a rate of exchange of $1.00 for each 361.-55 Japanese Yen face amounts recited in the certificates of deposit; and that interest on the certificates is payable from the date of issue to the date of payment, at the rate provided for in the certificates. This decision effected a reduction of 98.82% from the dollar amount recommended by the Hearing Examiner.

10. On October 24, 1958 the Deputy Director of the Office of Alien Property executed and mailed his FINAL SCHEDULE allowing the claims of each of the 1144 plaintiffs and computing the dollar amount thereof at $1.00 for each 361.55 Yen. The time limit for the filing of a complaint for review is fixed by law at sixty days thereafter.

11. The sole issue on this complaint for review is the determination of the proper dollar rate of exchange for the Yen face amount of the 1144 plaintiffs' certificates of deposit.

12. The facts relevant to the issues raised in this complaint for review will be found in the transcript of the record of proceedings in the Office of Alien Property of the Department of Justice, which transcript is to be filed herein pursuant to Section 34(f) of The Trading With the Enemy Act, as amended, within forty five (45) days after service of this complaint for review.

WHEREFORE, plaintiffs demand review of the FINAL SCHEDULE of the Office of Alien Property, pursuant to Section 34(f) of the Trading With the Enemy Act, as amended, and that the dollar rate of exchange for the Yen Certificates of Deposit of the plaintiffs be fixed at 23.4 cents for each Japanese Yen face amount recited in the certificate of deposit, and that their claims be allowed as PRIORITY (4) claims in the respective amounts.

/s/ Thomas H. Carolan

Thomas H. Carolan
Carolan & McHugh
821 Fifteenth St., N.W.
Washington 5, D. C.

/s/ Philip W. Amram

Philip W. Amram
Amram, Hahn & Sundlun
Washington Building
Washington 5, D. C.

December 15, 1958

[Filed May 18, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

George T. Aratani, et al.,
Plaintiffs,
v. Civil Action No. 3164-58

Robert F. Kennedy, Attorney
General of the United States,
Defendant

Kyuichi Sumiyoshi, et al.,
Plaintiffs
v. Civil Action No. 3228-58

Robert F. Kennedy, Attorney
General of the United States,
Defendant

Kinzuchi Shigeno, et al.,
Plaintiffs
v. Civil Action No. 1176-59

Robert F. Kennedy, Attorney
General of the United States,
Defendant

Kunio Abe, et al.,
Plaintiffs
v. Civil Action No. 2529-61

Robert F. Kennedy, Attorney
General of the United States,
Plaintiffs

MEMORANDUM AND FINAL ORDER

The above causes came before this Court for hearing on March 9, 1964, on the joint motions of plaintiffs and defendant for approval of a compromise of a class action pursuant to Rule 23(c) of the Federal Rules of Civil Procedure and for allowance of counsel fees. Subsequently, on March 17, 1964, an Interlocutory Order approving the compromise and awarding the counsel fees was signed. This order directed counsel for plaintiffs to give written notice of the proposed

compromise and the proposed counsel fees to all 2,963 claimants. The order further provided that a final hearing on these matters would be held on April 27, 1964, and that any interested party could object to the proposed settlement and fees, either in writing or by appearing in person or by counsel.

The compromise agreement was arrived at by counsel for the Office of Alien Property and counsel for the claimants. The parties then came before this Court and petitioned for approval in accordance with the Federal Rules of Civil Procedure. Counsel did not participate in any of the compromise negotiations before the Court, the tentative agreement having been achieved before the Supreme Court entered its Order, dated March 2, 1964, referring the causes to this Court for the approval of a compromise settlement.

Subsequent to the filing of the petition and prior to the issuance of the Interlocutory Order on March 17, 1964, this Court was satisfied that the proposed agreement was in the best interests of all the parties. However, the Court went beyond the mandatory requirements of Rule 23(c) and required notice by mail to all of the claimants.

Counsel for plaintiffs mailed copies of the Interlocutory Order, along with an explanatory letter, to each of the 2,963 claimants on March 18, 1964. The letter and the order each explained that the claimants should communicate written objections to the Court prior to April 27, 1964.

The Court received three letters setting out objections to the award of counsel fees. Two of these stated that the twenty per cent award was excessive. The claims of these two parties amount to a total settlement of $5,010.36. The third letter stated that the original agreement was for a fee of 10 per cent; this claimant will receive a settlement of $2,425.20.

These objections must be considered in the light of the 2,960 other claims and the total amount of $6,395,357.56. It should also be noted that the three claimants who now oppose the award of counsel fees would have received a total of $169.15 on the original schedule from the Office of Alien Property. Under the agreed settlement they will receive a total of $7,435.56, due primarily to the efforts by their counsel.

The Court received only one objection to the settlement, and this was from a claimant whose claim was previously disallowed by the Office of Alien Property. In addition, the Court received ten other written inquiries concerning other claims, which had been previously disallowed, changes of address, and other questions relating to the claims.

Affidavits filed by counsel for plaintiffs state that notices have been mailed to all claimants. Counsel further stated for the record that two hundred and fifty-five (255) notices from the first mailing were returned by the post office for various reasons. New addresses have been obtained for many of these claimants and counsel for both parties are continuing in their efforts to contact all claimants.

In addition to the notice by mail, counsel have also obtained publication in at least seven newspapers, in either English or Japanese, in the locales in which a majority of the claimants reside.

The affidavit filed by counsel for plaintiffs states that they have received more than one hundred and forty (140) letters from the claimants. Eighty-eight (88) of these gave a change of address, fifteen (15) notified counsel of the death of claimants, and thirty-seven (37) indicated approval of the proposed settlement and counsel fees. Counsel did not receive any objections to the compromise settlement or the amount of the counsel fees.

Immediately prior to the final hearing, a written objection to the allowance of counsel fees was filed by an attorney from Los

Angeles, California. His objection was based on the representation that he was retained by five of the claimants in 1949, that he filed their claims and is entitled to compensation. A response was filed by counsel of record, and thereafter that attorney filed a declaration under oath stating that in view of all the facts he believes that he is not, nor ever was, entitled to any fee allowed to counsel of record by this court.

As a result of this claim, the Court inquired as to the possibility of fees owed to other counsel, who at one time or other participated in claims on behalf of the parties. Mr. Thomas H. Carolan, one of the attorneys for the claimants, undertook a search of the records, and informed the court that there is a possibility that other counsel are entitled to nominal fees from the amount allowed. Mr. Carolan represented to the Court that he and his associate counsel of record are prepared to pay, and will pay, attorneys who filed retainer agreements with the Office of Alien Property prior to March 17, 1964.

On May 1, 1964, Mr. Carolan wrote to all other attorneys listed on the claims of record, and requested that they inform him of any fees to which they may be entitled.

In the Interlocutory Order of March 17, 1964, this Court stated that counsel of record would be responsible for all fees due to other counsel in that ". . . proper distribution of this fee shall be made by said counsel of record to all other counsel who have participated in this case and who have claims for counsel fees pending . . ." This Court is of the opinion that the burden of distribution of the fees should be with the counsel of record. Thirty-three attorneys have participated directly in the actions and the four principal attorneys have agreed on the distribution with those attorneys. This Court is not in a position to equitably rule on the distribution of the fee in that the attorneys are the only ones able to know the amount of work

and time expended by themselves. This is also true as to other attorneys who may have worked on various claims during the past seventeen years.

The Court is satisfied that a diligent effort has been made to locate and inform all attorneys who may have performed services in these actions. The Court will therefore rely on the principal attorneys to make any further distribution of attorneys' fees which are just and reasonable. The Court will not delay payment to the claimants of these funds which have been so long in litigation.

This Court is also of the opinion that the three objections to counsel fees which were submitted by claimants to the court are without merit. The record before the Court summarizes the services performed by counsel during the seventeen years these cases have been in litigation, and the twenty per cent award appears to be adequately justified under the unusual hardship provision of Section 20 of the Trading with the Enemy Act (50 U.S.C. App. 20). Furthermore, counsel for the Government, in approving the proposed compromise, agreed that they would offer no objection to an aggregate of fees which does not exceed twenty per cent.

ORDER

Accordingly, it is this 18th day of May, 1964,

ORDERED, that the Interlocutory Order of March 17, 1964, be, and the same hereby is, made final, except that the word "pending" is hereby stricken from the last line of page 3 and at the end of the first paragraph of page 4 of the Interlocutory Order; and the Office of Alien Property is directed to proceed with the payments to the respective claimants in accordance with the compromise agreement; and

IT IS FURTHER ORDERED, that the Office of Alien Property promptly pay attorneys' fees to counsel of record as follows:

(a) from the Sumitomo Bank Ltd. Account to Roger E. Brooks and James P. Parker the sum of $42,880.00; and they, in turn, shall make distribution of a proper share to Shiro Kashiwa of Kashiwa and Kashiwa, and to any other attorneys with whom the said Roger E. Brooks and/or James P. Parker may have contractual agreements for a share of said fee, but whose names have not been included in the schedules annexed to the Petition for Allowance of Attorneys' Fees; and

(b) from the Sumitomo Bank, Ltd. Account to Thomas H. Carolan and Philip W. Amram, the sum of $199,889.69; and they, in turn, shall make distribution of a proper share to Alfred Gitelson and to any other attorneys with whom the said Thomas H. Carolan and/or Philip W. Amram may have contractual agreements for a sharing of said fee, but whose names have not been included in the schedules annexed to the Petition for Allowance of Attorneys' Fees; and

(c) from the Yokohama Specie Bank Account to Thomas H. Carolan and Philip W. Amram the sum of $1,036,309.82; and they, in turn, shall make distribution of a proper share to Alfred Gitelson and to any other attorneys with whom the said Thomas H. Carolan and/or Philip W. Amram may have contractual agreements for a sharing of said fee, but whose names have not been included in the schedules annexed to the petition for Allowance of Attorneys' Fees.

IT IS FURTHER ORDERED, that Defendant, following final payment to the class plaintiffs and to counsel, pursuant to the Order of March 17, 1964, and this Order, shall inform the Court to that effect, and present an appropriate order.

/s/ Leonard P. Walsh
Judge

Attorneys:

Thomas H. Carolan, Esq., 1815 H Street, N.W., and
Philip W. Amram, Esq., Washington Building,
Washington, D. C.
For Plaintiffs in the Aratani, Shigeno and Abe cases;

Roger E. Brooks, Esq., 923 20th Street, N.W., and
James P. Parker, Esq., 1028 Connecticut Avenue, N.W.,
Washington, D.C.
For Plaintiffs in the Sumiyoshi case;

Armand DuBois, Esq., Department of Justice, Washington, D.C.
For the Defendant

[Filed

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUNIO ABE, P. O. BOX 145 Caldwell, Idaho; MASAO ABE, 217 S. Boyle Avenue, Los Angeles 33, California; MOHEI OHASHI, 2020-A Kalihi Street, Honolulu 17, Hawaii; MITSUJI ADACHI, 1145 South Kingsley Drive, Los Angeles 6, California; TAMEKICHI ENDO, 13009 Maclay Street, San Fernando, California; YOSHIMATSU MINAMI, 863 Lucile Avenue, Los Angeles 26, California; MRS. YONE ONO, 1406 North Gordon Street, Los Angeles 28, California; SHUJI SHISHIDO, 2827 Mayfield Avenue, La Crescenta, California; SADAICHI INABU, 1357 Quintero Street, Los Angeles 26, California; KINU KURIHARA TAHARA, 3833 West 27th Street, Los Angeles 18, California; KIYOSHI TANIMURA, 557 West Athens Avenue, Los Angeles 44, California; for themselves and for the 1807 others similarly situated.

Plaintiffs.

v.

Civil Action
No. 2529-'61

ROBERT F. KENNEDY, Attorney General of the United States, Department of Justice Building, Washington, D.C.

Defendant

COMPLAINT FOR REVIEW OF DECISION OF DIRECTOR OF ALIEN PROPERTY

1. Jurisdiction is founded upon the provisions of Section 34(f) of The Trading With the Enemy Act, as amended. (50 U.S.C. APP)

2. These plaintiffs bring this action on their own behalf and on behalf of the 1807 other persons similarly situated whose names are listed under "Priority (4)" in the office of Alien Property Final Schedule in the matter of the insolvent account of The Yokohama

Specie Bank, Ltd., dated May 11, 1961 under the title "Certificate of Deposit". This action is brought because:

(a) The number of plaintiffs, 1817, is too large to permit them all to join;

(b) The questions of fact and law as to every one of the 1817 plaintiffs is identical;

(c) Every one of the 1817 plaintiffs has an identical claim against the specific fund involved in this action, based upon identical written documents, issued by the Bank, differing only in date, name of depositor, and amount and rate of interest;

(d) The Maximum amount recoverable by many of the plaintiffs is less than $250 each, so that the cost of an independent complaint for review by each of the 1817 plaintiffs would be oppressive;

(e) The ten named plaintiffs herein, whose claims in the aggregate amount exceed 5% of the total amount claimed by all the priority (4) claimants listed in said Final Schedule under the title "Certificate of Deposit", can and will adequately represent all the 1817 priority (4) claiments listed in said Final Schedule under the title "Certificate of deposit".

3. The defendant, Robert F. Kennedy, is sued herein in his official capacity as Attorney General of the United States.

4. Pursuant to Vesting Orders of the Alien Property Custodian issued in 1943, certain assets and properties of the Yokohama Specie Bank, Ltd., a Japanese corporation engaged in business in the United States, were vested under the Trading With the Enemy Act, as amended.

5. The United States now holds approximately $14,356,414.70 in cash as the proceeds of the liquidation of the vested property.

6. The 1817 plaintiffs, above identified, all held identically worded Yen Certificates of Deposit issued to them in the United

States in exchange for the deposit of dollars in the said bank. Said certificates were cashable or redeemable upon demand at any time in dollars at the office of the Bank in the United States or in Yen at the office of the Bank in Japan.

7. The 1817 plaintiffs all filed timely debt claims under Section 34 of The Trading With the Enemy Act, as amended.

8. The said claims were duly heard before George W. Carr, a Hearing Examiner of the Office of Alien Property, who, on January 31, 1957, recommended to the Director of the Office of Alien Property that all of said claims of the said 1817 plaintiffs be allowed in dollars at the rate of exchange of 23.4 cents for each Japanese Yen face amount recited in the Certificate of Deposit with interest thereon from date of deposit to December 8, 1941, at the rate of 3.3 per cent per annum.

9. On November 13, 1957, the Director of the Office of Alien Property issued his decision confirming the allowance of the claims of the said 1817 plaintiffs, but reducing the amount thereof to an amount in dollars equal to a rate of exchange of $1.00 for each 361.-55 Japanese Yen face amounts recited in the certificates of deposit; and that interest on the certificates is payable from the date of issue to the date of payment, at the rate provided for in the certificates. This decision effected a reduction of 98.82% from the dollar amount recommended by the Hearing Examiner.

10. On August 1, 1961, the Deputy Director of the Office of Alien Property executed and mailed his FINAL SCHEDULE allowing the claims of each of the 1817 plaintiffs and computing the dollar amount thereof at $1.00 for each 361.55 Yen. The Time limit for the filing of a complaint for review is fixed by law at sixty days thereafter.

11. The sole issue on this complaint for review is the determination of the proper dollar rate of exchange for the Yen face amount of the 1817 plaintiffs' certificates of deposit.

12. The facts relevant to the issue raised in this complaint for review will be found in the transcript of the record of proceedings in the Office of Alien Property of the Department of Justice, which transcript is to be filed herein pursuant to Section 34(f) of The Trading With the Enemy Act, as amended, within forty five (45) days after service of this complaint for review.

WHEREFORE, plaintiffs demand review of the FINAL SCHEDULE of the Office of Alien Property, pursuant to Section 34(f) of The Trading With the Enemy Act, as amended, and that the dollar rate of exchange for the Yen Certificates of Deposit of the plaintiffs be fixed at 23.4 cents for each Japanese Yen face amount recited in the certificate of deposit, and that their claims be allowed as PRIORITY (4) claims in the respective amounts.

/s/ Thomas H. Carolan

Thomas H. Carolan
Carolan & McHugh
821 Fifteenth Street, N.W.
Washington 5, D.C.

Philip W. Amram
Amram, Hahn & Sundlun
Washington Building
Washington 5, D. C.

Attorneys for Plaintiffs

August 3rd, 1961

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

George T. Aratani, et al.,
Plaintiffs

v. Civil Action No. 3164-58

Robert F. Kennedy, Attorney General of the United States,
Defendant

Kyuichi Sumiyoshi, et al.,
Plaintiffs

v. Civil Action No. 3228-58

Robert F. Kennedy, Attorney General of the United States,
Defendant

Kinzuchi Shigeno, et al.,
Plaintiffs

v. Civil Action No. 1176-59

Robert F. Kennedy, Attorney General of the United States,
Defendant

Kumio Abe, et al.,
Plaintiffs

v. Civil Action No. 2529-61

Robert F. Kennedy, Attorney General of the United States,
Defendant

MEMORANDUM

This matter came before the Court on March 11, 1964, on a petition for compromise of class actions under Rule 23(c) of the Federal Rules of Civil Procedure, and on a motion for approval of counsel fees as provided by Section 20 of the Trading with the Enemy Act, 50 U.S.C. App. 20.

I

These cases concern claims by depositors who had exchanged dollars for yen certificates with American branches of the Sumitoma Bank, Ltd. and the Yokohama Specie Bank, Ltd. These were branches of Japanese banks and were located in California, Washington, and Honolulu. The transactions took place prior to December 7, 1941. Upon commencement of hostilities, the United States seized the American Branches, and the banks did not open for business thereafter. After the war, several thousand claimants sought redemption of their yen certificates through the Office of Alien Property.

Claims were duly filed and processed, and after a series of hearings in 1955 and 1956, the Hearing Examiner allowed the claims at the yen-dollar exchange rate of 23.4 cents, the pre-war dollar value of the yen. The Director of the Office of Alien Property reversed this finding and held that the post-war rate of 361.55 yen for one dollar was the rate of exchange to be used.

The decision of the Director was upheld by this Court and summary judgment was granted for the Government in Aratani, et al. v. Kennedy, Civil Action No. 3164-58. The decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit, reported in 317 F. 2d 161. The Supreme Court granted certiorari on October 21, 1963. However, prior to the submission of the case, counsel for the parties entered into discussions in an effort to settle the case. A tentative compromise agreement was achieved, and the petition for certiorari was withdrawn.

The proposed compromise concerns four cases, all of which are in dispute over the rate of exchange. These are class actions, involving 2,963 claimants, and, as such, cannot be dismissed or compromised without approval of the court pursuant to Rule 23(c) of the Federal Rules of Civil Procedure.

These claims, if paid at the pre-war exchange rate of 23.4 cents would result in total payments of $15,433,795.41, or $4,909,-307.42 to the Sumitomo group and $10,524,487.99 to the Yokohama Specie group. If paid at the post-war rate of 361.55 yen per dollar, the total amount would be $168,587.46, or $54,547.86 to the Sumitomo group and $114,039.60 to the Yokohama Specie group.

The assets of the Sumitomo Bank now in the possession of the Office of Alien Property total $1,213,808.44. This represents the total amount which can be paid to these claimants, regardless of the rate of exchange to be used.

The proposed compromise would pay a total of $6,395,357.56, less counsel fees. This includes the full amount in the Sumitomo bank of $1,213,808.44, and $5,181,549.12 to the Yokohama claimants.

The $1,213,808.44, less counsel fees, which is to be paid to the Sumitomo claimants, represents 100 per cent of the amount which can be paid as it is the total amount of the fund. This amount is 25 per cent of the maximum amount claimed under the pre-war exchange rate of 23.4 cents per yen. However, under the proposed settlement each claimant will receive approximately 43 times the amount which was finally allowed by the Office of Alien Property.

The $5,181,549.12, less counsel fees, which is to be paid to the Yokohama Specie Claimants represents 49 per cent of the amount claimed as the maximum under the pre-war exchange rate. This amount is approximately 85 times the amount allowed by the Office of Alien Property.

Counsel for the claimants urge several reasons for approval of the proposed compromise. Among the reasons which are persuasive is the assertion that the total amount to be paid, after deduction of attorneys' fees, represents more dollars than were originally paid by the depositors; the pre-war exchange rate represents 85 times

the amount allowed by the Office of Alien Property, and 83 times the amount of the post-war rate. Counsel further assert that the original deposits represented the life savings of many of the claimants, who are now retired, and this amount is a greater asset to them at the present time than an even larger amount at a later date if the results of the litigation were favorable. Counsel also cite the protracted history of this litigation, encompassing more than 17 years, and the 22 years since the assets were seized by the Government.

Counsel for the Government urge that this proposed fifty-fifty settlement is fair and reasonable in the light of the present chances of ultimate victory or defeat. Counsel stated that had certiorari not been withdrawn, that the Government would have urged that the Supreme Court adopt the Director's decision, since there was no rate of exchange on December 8, 1941, and apply the first available rate on the authority of Sutherland v. Maher, 271 U.S. 272 (1926).

The Government then suggests that a second alternative for the Supreme Court would have been the pre-war rate which was in effect on August 26, 1941, the nearest rate to the breach date.

And finally, the third alternative posed is that a triangular rate be used. For example, on December 8, 1941, there was a rate between Swiss francs and Japanese yen in Switzerland; and there was a rate for United States dollars and Swiss francs. Thus, a triangular rate would have achieved a theoretical exchange for yen-dollars in Switzerland on the breach date.

The duty of this Court is well stated in Winkleman, et al. v. General Motors Corp., et al., (S.D., N.Y., 1942), 48 F. Supp. 490, 493:

> "The role of the court on the compromise of a stockholders derivative action is described by Mr. Justice Rosenman in Newberger & Co. v.

Barrett, et al. (not published), June 25, 1942. He wrote:

> "'The role of the court is to see that the compromise is fair and reasonable under the circumstances and that no collusion or fraud has been practiced in the consummation of the settlement. To do this the court must weigh the probabilities and possibilities of victory or defeat as indicated by the legal or factual situation presented. If such considerations lead to the conclusion that the settlement agreed upon by the plaintiffs in the suit is not unfair or unreasonable to the corporation (in which all other stockholders have their interest), then the action of the plaintiffs in compromising the suit should be approved.'"

This Court has reviewed this matter at length and concludes that the proposed settlement is fair and reasonable to the claimants, on the basis of the actual amounts to be received, and on the basis of the possibilities of successful termination of the litigation.

II

Counsel have petitioned this Court to approve fees in the amount of 20 per cent of the total settlement. Counsel fees would total $1,279,071.51, or $1,036,309.82 from the Yokohama funds and $242,-761.69 from the Sumitoma funds.

Section 20 of the Trading with the Enemy Act (50 U.S.C. App. 20, as amended), provides for counsel fees of 10 per cent of such payment. However, the section further provides for a higher fee in the following manner:

> ". . . The court hearing such petition, or a court awarding any judgment in respect of any such property or interest or proceeds, as the case may be, shall approve an aggregate of fees in excess of 10 per centum of the value of such property or interest or proceeds only upon a finding that there exist special circumstances

> of unusual hardship which require the payment of such excess. . . ." (our emphasis)

Counsel for the Government in approving the proposed compromise have agreed that they would offer no objection to an aggregate of fees not in excess of 20 per cent.

This litigation has required the services of 33 attorneys, who have devoted varying amounts of time over the past seventeen years. The six principal attorneys have set forth detailed affidavits to substantiate their petition for an aggregate of fees of 20 per cent.

Mr. Thomas W. Carolan estimates he has averaged 15 hours a week during the past seventeen years. He further states that he has written in excess of 30,000 letters, 17,000 of which were dictated. He estimates his total expenditures, not including office overhead, at $66,894.92.

In addition to the litigation over the years, Mr. Carolan also devoted numerous hours to legislative hearings. Prior to 1953, when the Office of Alien Property was delaying the hearing on the subject claims, various bills were introduced in Congress which would have eliminated the debt claims. The bills had the active support of the Office of Alien Property.

One bill passed the Senate in spite of the opposition by Mr. Carolan. It failed to come before the House. Subsequent bills were introduced into both Houses and counsel devoted many hours to opposing them and testified before legislative committees on various occasions.

Mr. Philip W. Amram has been counsel since 1958. He estimates that his overhead costs, including the services of his partners and associates, to be between $30,000 and $40,000.

Mr. Roger E. Brooks estimates that he has devoted 446 hours to this litigation since 1958. Mr. James P. Parker estimates that

he has devoted 120 hours. The sum total of estimated time by Messrs. Brooks, Parker and Kashiwa is 1330 hours. For these services they may expect to divide a maximum fee of $42,700.

Finally, Mr. Alfred Gitelson of California estimates that his services occupied in excess of 7,500 lawyer's work hours, and he estimates that his staff expenses were not less than $50,000.00.

It is the opinion of this Court that counsel have clearly substantiated their petition for an aggregate of fees in the amount of 20 per cent of the total payment. Not only is this amount justified by the estimated hours expended, but the compromise is clearly a successful termination for the claimants and the diligence demonstrated by counsel is in keeping with the highest traditions of the legal profession.

III

This Court will issue an interlocutory order approving the compromise settlement and awarding counsel fees in the amount of 20 per cent, subject to a final hearing prior to which the claimants will be afforded opportunity to object to the settlement and the counsel fees.

This Order will direct counsel for plaintiffs to give notice of the Order to all claimants, informing them that a final hearing will be held on Monday, April 27, 1964, at which time they may appear personally or by counsel if they wish to oppose the compromise or the award of attorneys' fees, or to submit objections in writing to this Court before the hearing date.

/s/ Leonard P. Walsh
Judge

March 17, 1964

Attorneys:

Thomas H. Carolan, Esq. and Philip W. Amram, Esq.
Washington Building, Washington, D.C.
Attorneys for Plaintiffs in the Aratani, Shigeno and Abe cases

Roger E. Brooks, Esq., 923 - 20th Street, N.W., Washington, D.C.
James P. Parker, Esq., 1028 Connecticut Ave., N.W.,
Washington, D. C.
Attorneys for Plaintiffs in the Sumiyoshi case

Armand DuBois, Esq., Department of Justice, Washington, D.C.
Attorney for Defendant

[Filed May 27, 1968]

NOTICE OF APPEAL

Notice is hereby given that Thomas H. Carolan and Philip W. Amram appeal to the United States Court of Appeals for the District of Columbia Circuit from the separate order of the United States District Court for the District of Columbia filed April 30, 1968 rejecting the application of Thomas H. Carolan and Philip W. Amram for the award of attorneys' fees and providing instead for the payment of the claims of counsel who participated at the administrative level on behalf of claimants coming within the Honda class upon the terms and conditions of, and subject to the limitations of, said order filed April 30, 1968.

/s/ Thomas H. Carolan
/s/ Philip W. Amram
Appellants pro se
/s/ Gilbert Hahn, Jr.
/s/ Bruce G. Sundlun
Attorneys for appellants

[Certificate of Service Omitted in Printing]

[Filed June 28, 1968]

NOTICE OF CROSS APPEAL

Notice is hereby given that the defendant, Ramsey Clark, Attorney General of the United States, cross appeals to the United States Court of Appeals for the District of Columbia Circuit from so much of the separate order of the United States District Court for the District of Columbia filed April 30, 1968 which provides for the payment of fees to counsel for their services on behalf of claimants coming within the Honda class during the administrative stage in this case.

Dated: June 28, 1968

/s/ Edwin L. Weisl, Jr.
Assistant Attorney General
Civil Division
Director, Office of Alien Property

/s/ Irving Jaffe

/s/ Morton Hollander

/s/ Bartlett S. Atwood

Attorneys, Department of Justice

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,188

AYAKO HONDA, *et al.*
THOMAS H. CAROLAN and PHILIP W. AMRAM,
Appellants

v.

JOHN N. MITCHELL,
Attorney General of the United States

No. 22,193

AYAKO HONDA, *et al.*

JOHN N. MITCHELL,
Attorney General of the United States,
Appellant.

BRIEF FOR APPELLANTS

Bardyl R. Tirana, Esq.
Amram, Hahn & Sundlun
700 Colorado Building
Washington, D. C. 20005
Attorney for Appellants

THOMAS H. CAROLAN, ESQ.
and
PHILIP W. AMRAM, ESQ.
Appellants pro se

Washington D C THIEL PRESS 202 393 0625

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,188

AYAKO HONDA, *et al.*
THOMAS H. CAROLAN and PHILIP W. AMRAM,
Appellants

v.

JOHN N. MITCHELL,
Attorney General of the United States

No. 22,193

AYAKO HONDA, *et al.*

JOHN N. MITCHELL,
Attorney General of the United States,
Appellant.

BRIEF FOR APPELLANTS

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal relates exclusively to the award of counsel fees.

1. Carolan and his associates are entitled to substantial compensation in this proceeding for their services rendered from 1947 to 1958, for the benefit of the *Honda* claimants, before the Hearing

Examiner, before the Director and at the legislative level prior to the commencement of the Petition for Review proceedings in *Abe v. Kennedy* and *Aratani v. Kennedy* in the District Court. No other lawyer may share or participate in such compensation or diminute the value or amount thereof except a lawyer who himself actively appeared and participated in the hearings before the Hearing Examiner, in the various proceedings before the Director, and in the presentations to the Congress.

2. In addition to the foregoing, Carolan and Amram and their associates are entitled to substantial compensation in this proceeding for their services rendered from 1958 to 1964, for the benefit of the *Honda* claimants, in the Petition for Review proceedings in *Abe v. Kennedy* and *Aratani v. Kennedy* in the District Court, in the Court of Appeals and in the Supreme Court of the United States, specifically including services from which the *Honda* claimants benefited in

(a) securing in this Court a reversal of the decision of the Office of Alien Property and the District Court that the certificates held by all Yokohama Specie Bank claimants, including all the *Honda* claimants, were obligations payable *only in yen in Japan*; and securing instead a *res judicata* judgment of this Court that the certificates were payable *in the United States in dollars*.

(b) fixing the *value* of the certificates held by the *Honda* claimants at nearly 100 times the value fixed by the Director of the Office of Alien Property, by the District Court and by this Court.

(c) tolling the statute of limitations which otherwise would have barred all claims of the *Honda* claimants, so as to permit independent counsel for the *Honda* claimants to recover in the *Honda* action, which was not commenced until after the successful completion of the *Abe* and *Aratani* litigation.

In conformity with Rule 8(d) of this Court, we wish to inform the Court that the *Honda* case was previously before this Court under the name of *Honda v. Katzenbach* in No. 19284 and that this appeal involves directly the services rendered in *Aratani v. Kennedy* previously before this Court in No. 16808.

III. STATEMENT OF THE CASE

(A) Nature of the case

The position of Carolan and Amram, the appellants in this appeal can be simply and concisely stated as follows:

(1) Carolan and Amram and their associates rendered legal services over a period of seventeen years for the benefit of the *Honda* claimants. The services were rendered by differing individuals at two different stages from 1947 to 1964.

(2) The first set of services were rendered by Carolan and his associates in the "administrative period" while the Yokohama Specie Bank claims were pending before the Office of Alien Property from 1947 to 1958. All these services were prior to the commencement of the filing of the Petition for Review in the District Court of the *Aratani* and *Abe* litigation. Judge Jones acknowledged these services to be for the benefit of the *Honda* claimants and made an award of counsel fees with respect to them. However, the amount and terms of his award are patently inadequate to compensate Carolan and his associates for those services. As to this phase of this appeal, the only issue is the amount of the compensation which should be awarded to Carolan and his associates.

(3) The second set of services was rendered by Carolan and Amram and their associates in the District Court, in this Court and in the Supreme Court in the *Abe-Aratani* litigation from 1958 to 1964. Judge Jones held that those services did *not* benefit the

Honda claimants in any manner and that Carolan and Amram are entitled to no compensation with respect to those services. Here the issue is the correctness of that refusal to grant any compensation for those services.

(B) The proceedings below

After the reversal of *Honda* by the Supreme Court (386 U.S. 484) and the remand of the case by this Court to the District Court, Carolan and Amram duly filed on June 30, 1967 a Petition for the Award of Counsel fees with accompanying Exhibits and Points and Authorities. (App. 44).[1] After oral argument before Judge Jones on July 6, 1967, the Petition was amended to conform to the positions taken at the oral argument that the award of any fees to Carolan and Amram should be subordinated to the payment of the full amount awarded to all the *Honda* claimants and to the Rauh-Wirin group, who had been counsel for the *Honda* claimants in the *Honda* litigation. (App. 53-54). No testimony was taken at the July 6 hearing.

On July 17, 1967, the Government filed its Memorandum in Opposition to the grant of fees to Carolan and Amram including an accusation of unprofessional conduct on their part. This raised vital issues of fact on which no testimony had been taken. (App. 54).

By virtue of the introduction of these new matters, Carolan and Amram filed a Reply Memorandum and a Motion for Leave to file a Second Amended Petition which dealt, *inter alia*, with the new matters raised in the Government's Opposition. The "due process" issue was raised as to these new matters and a full "day in court" was requested if these new matters were to be considered by Judge Jones in disposing of the matter. (App. 55-57).

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[1] Reference to the Appendix will be made by the abbreviation "App.". Reference to the original record not reprinted in the Appendix will be made by the Record Item number as set forth in the Index of Record. (App. 10-14).

After considering the matter for several months, Judge Jones filed his opinion on October 25, 1967 disposing of the matter on the papers which had been filed and the discussion at the oral argument. He ignored the Government's assertion of unprofessional conduct and therefore did not order a hearing on the facts. He declined to permit the filing of the Second Amended Petition on the ground that all the facts asserted therein were already part of the record. He granted the application for counsel fees in part and rejected it in part. (App. 58).

He approved the payment of counsel fees to Carolan and his associates for the first set of services rendered in the "administrative period" but subject to serious limitations and conditions. (App. 66-69). He directed that supplementary memoranda be filed to identify the counsel who had participated in the administrative proceedings and to suggest the division of the fees between them. (App. 68).

Carolan and Amram promptly filed with Judge Jones[2] the requested supplementary memoranda (App. 82, 88) but the Attorney-General never filed any such memoranda.

The Attorney-General filed Exceptions and Objections to Judge Jones' opinion insofar as it awarded any fees to Carolan and his associates with respect to services rendered in the "administrative period". (App. 73). Carolan and Amram filed a Response with counter-exceptions. (App. 78).

The matter then came on for argument on the exceptions and counter-exceptions. Again no testimony was taken on any issue. Following the oral argument, Judge Jones entered his final order dated April 30, 1968. He maintained without change his basic position as stated in his opinion of October 25, 1967. However, he

[2]Judge Jones inadvertently stated in his final judgment of April 30, 1968 (App. 91) that "Such suggestions were not submitted." This is correct as to the Attorney-General; it is not correct as to Carolan and Amram (App. 82, 88).

added further restrictions and limitations to the award of compensation to Carolan and associates for the services rendered during the administrative period. He excluded from the fund upon which the allowed fee would be computed, all claims in which the claimant had retained counsel as of April 30, 1968. This exclusion could conceivably apply not only to those cases where attorneys only assisted the claimant in filling out his claim form but also to cases where an attorney was consulted by a claimant but did not file an appearance with the custodian and to cases where the claimant never hired a lawyer until *after* the administrative proceedings had been completed. Only after making a detailed investigation as to the number and amount of the excluded claims can anyone estimate the dollar value award of compensation to Carolan and associates. It could be near zero. (App. 90, 93, 95).

(C) Statement of the Facts

This case begins with the seizure of the assets of the Yokohama Specie Bank after Pearl Harbor Day and their subsequent vesting in the Alien Property Custodian in 1943. Approximately 7,500 depositors of the Bank held "yen certificates" issued by the Bank and filed administrative claims on the certificates with the Custodian within the extended time period allowed for the filing of claims.

From the point of view of this appeal, the 7,500 claimants break down into three groups–

(1) Some 1,600 claimants elected to cash in their certificates in Japan and are therefore eliminated from present consideration.

(2) Some 1,800 claimants turned in their certificates to the Custodian and became parties to the *Abe-Aratani* litigation in the District Court, in this Court and in the Supreme Court. These are referred to in this brief as the "*Abe* claimants".

> (3) The remaining 4,100 claimants did not turn in their certificates to the Custodian and became parties to the *Honda* litigation in the District Court, in this Court and in the Supreme Court. These are referred to in this brief as the "*Honda* claimants". (386 U.S. at 489).

(1) *Services rendered during the administrative period.*

All the "yen certificates" were stated in face amounts in yen. The Custodian having conceded that the certificates were "debt claims" within the terms of § 34 of the Trading with the Enemy Act, the crucial issue was the conversion rate to be applied to convert the claims from yen into dollars for payment.

This in turn depended upon the crucial issue of whether the instruments were yen obligations payable only in Japan or were dollar obligations payable in the United States.

Carolan, with his chief associate Gitelson and their auxiliary associates, took the position that the certificates were dollar obligations payable in the United States and convertible into dollars at the rate of 23.4 cents per yen. The Custodian took the position that the certificates were yen obligations payable only in Japan and convertible into dollars at the rate of 361.55 yen to the dollar, a reduction of 98.82%.

Carolan and his associates fought this issue through the administrative period as the sole counsel of record for fourteen years from 1947 to 1961. The administrative proceeding was entitled "*Kunio Abe et al.*" Carolan and his associates represented *all* the Yokohama claimants, including both the *Abe* claimants and the *Honda* claimants. The Chief of the Claims Branch of the "Office of Alien Property", which succeeded the "Alien Property Custodian" (and which is also referred to in this brief for simplicity as the "Custodian") recognized Carolan and his associates as counsel of record for

all claimants. The Hearing Examiner did likewise (Record Item 19, Appendix I, pp. 16, 19, 20, 21, 22).

In 1953, by stipulation between Carolan and his associates on the one hand and the Chief of the Claims Branch of the Custodian on the other, the Yokohama Specie Bank case was consolidated with an identical case involving the identical form of certificates issued by the Sumitomo Bank, a competitor of the Yokohama. (386 U.S. at 488). From 1953 on, the two sets of certificates issued by the two banks were handled as an integrated unit, and the consolidated claimants were identified as *Kunio Abe et al.* (*Ibid.*)

After nearly 4 years of litigation before the Hearing Examiner, in the consolidated hearing, Carolan and his associates scored a resounding initial victory, obtaining from the Hearing Examiner a Recommended Decision (Record Item 19, Appendix I, p. 22), specifically adjudicating that the certificates were dollar obligations payable in the United States in dollars. On the basis of this, the Hearing Examiner recommended that payment be made to the certificate holders on the basis of 23.4 cents per yen face amount. (*Ibid.*).

Pursuant to the procedures in the Custodian's office this Recommended Decision was then reviewed by the Director of the Office. He reversed the Hearing Examiner (*ibid.*) finding that the certificates were payable *only* in yen in Japan and *not* in dollars in the United States. Accordingly, payment to certificate holders was directed on the basis of 361.55 yen to the dollar, a 98.82% reduction of the amount claimed by Carolan and his associates and recommended by the Hearing Examiner. (*Ibid.*; App. 59).

The Attorney-General affirmed the finding of the Director (Record Item 19, Appendix I, p. 22; 389 U.S. at p. 489) and notice was sent to *all* the claimants, including the *Honda* claimants, to send in their certificates for redemption. (App. 59; 386 U.S. at p. 489).

Following this notice, 1,817 claimants sent in their certificates and were subsequently joined as plaintiffs in the *Abe* suit. The claimants who did not send in their certificates, probably because of the small amount offered by the Custodian, were later joined as plaintiffs in the *Honda* suit. (App. 60; 386 U.S. at 490-3, 499-500).

In accordance with the procedures of the Office of Alien Property, a "Final Schedule" was prepared and filed August 1, 1961. In this Schedule, the 1,817 *Abe* claimants were included at the 361.55 to the dollar figure; *all* the *Honda* claimants were totally excluded. (App. 60).

This constituted the end of the administrative proceedings with respect to the Yokohama certificates in the Custodian's office.

In addition to the prosecution of the *Abe* and *Honda* claimants' claims through the Hearing Examiner's proceedings and the proceedings in the Attorney-General's office, as described above, up to August 1961, Carolan and his associates rendered additional services to both the *Abe* and the *Honda* claimants during the "administrative period".

On June 27, 1953, when the Custodian was delaying the hearing on the claims, Senator Dirksen introduced in the Congress S. 2231 which would have eliminated all the Japanese bank debt claims, including the claims of all the *Honda* claimants. This bill had the active support of the Office of Alien Property. (App. 119; Record Item 19, Appendix I, pp. 16-17).

Carolan, all alone, vigorously opposed this bill. It passed the Senate in spite of his opposition, but it failed in the House, as the result of his efforts. Other bills were introduced in both Houses and Carolan devoted many hours to opposing them successfully and in testifying before legislative committees on various occasions. (*Ibid.*).

Finally, Carolan and his associates rendered invaluable services to many of the *Honda* claimants in obtaining an extension of time for the initial filing of their claims.

Under the original Orders of the Custodian, the time limit for the filing of claims expired August 8, 1948. A substantial number of claims were filed after this date, and a formal hearing was ordered before a Hearing Examiner of the Office of Alien Property,[3] on a demand for the dismissal of these claims as untimely filed. After this hearing and while the Hearing Examiner was considering the matter, Carolan alone negotiated with Honorable David Bazelon, then the Custodian, and secured a new bar date for the filing of claims of November 18, 1949 (a 15-month extension).

Pursuant to this extension, the motions to dismiss the claims were withdrawn and all claims filed between August 8, 1948 and November 1, 1949 were accepted by the Custodian as timely filed. (App. 79; Record Item 19, Appendix I, pp. 4-8).

Thousands of claims were filed during this new extended period. Every claim bearing a Claim Number greater than 39533 was allowed to be filed *solely* as the result of Carolan's services in obtaining this extension of time. (App. 79-80). These amount to approximately 60% of all the *Honda* claims. (App. 79; Record Item 25, p. 7).

(2) *Services rendered at the litigation level.*

(A) In the District Court

The filing of the Final Schedule by the Director on August 1, 1961 meant the end of the Yokohama matter, unless a review of the Director's decision was initiated within the sixty (60) day period fixed by § 34 of the Trading with the Enemy Act.

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[3]Carolan appeared at that Hearing on behalf of more than 500 late-filing claimants.

We have noted above that the *Abe* administrative proceedings with respect to *all* Yokohama certificate holders had been consolidated with the *Aratani* administrative proceedings with respect to the identical problem of *all* Sumitomo certificate holders.

The consolidated Decision of the Director, rejecting the position of Carolan and his associates, was filed on November 13, 1957. For internal reasons within the Custodian's office, the office decided to postpone any action in preparing a Final Schedule of Yokohama certificate holders and to concentrate initially on preparing a Final Schedule of Sumitomo certificate holders. The Sumitomo Final Schedule was accordingly filed October 24, 1958 (Record Item 19, Appendix I, pp. 22-24).

Immediately thereafter, Carolan asked Amram to associate himself in the necessary forthcoming Sumitomo litigation. Carolan and Amram thereupon filed the statutory Complaint for Review entitled *Aratani v. Rogers* on December 15, 1958, within the sixty (60) day time limit. (App. 99; Record Item 19, Appendix I, p. 24; Appendix II, p. 1; Statement of Philip W. Amram, pp. 3-4). The sole issue raised in the Complaint was the yen-dollar conversion figure (App. 101).

The delayed Yokohama "Final Schedule" was not filed by the Director until August 1, 1961, almost three years after the Sumitomo schedule and while *Aratani* had been in active litigation on review in the District Court for two and a half years. (App. 101).

In the *Aratani* litigation, on September 26, 1960, long before the "Final Schedule" was filed on August 1, 1961 in the Yokohama matter, the Attorney-General as defendant moved for summary judgment in favor of the Government. (Record Item 19, Appendix II, p. 3). After briefs had been filed and the matter had been argued orally, Judge Walsh, on July 7, 1961, about a month prior to the

filing of the Final Schedule in Yokohama, granted the motion for summary judgment. (*Ibid.*).

The Yokohama Final Schedule was thereafter filed while these summary judgment proceedings were being concluded.

Carolan and Amram promptly filed a Petition for Review on August 3, 1961 on behalf of *Abe* and the 1,817 Yokohama claimants whose claims had been allowed and who had received awards at the rate of 361.55 yen to the dollar in the Yokohama Final Schedule. (Record Item 19, Statement of Philip W. Amram, p. 9). This Petition did not include the *Honda* claimants, who had been excluded from the Final Schedule.

Since the issue of the value of the certificates was identical in *Abe* and *Aratani*, and since *Aratani* was already in active litigation at the summary judgment stage it was agreed that *Abe* should be held in abeyance in the District Court pending the final determination of the identical issue in the test case of the Sumitomo certificates in *Aratani*. (*Ibid.*).

Although the *Honda* claimants were not included in the *Abe* Petition for Review, no *Honda* claimant sought to intervene in the *Abe* litigation. Instead, they and their counsel sat on the sidelines and watched Carolan and Amram spend three (3) years litigating *Abe-Aratani* through the District Court, through this Court and into the Supreme Court before the final compromise was reached in 1964 giving the certificates, in question, *including all the Honda certificates* a value of 8500% of the figure initially fixed by the Director in his Final Schedule, and sustained in both the District Court and this Court. (App. 37-38; see also 386 U.S. at 491-4).

The *Aratani* summary judgment proceedings were ultimately concluded on November 7, 1961 by the entry of a final order in favor of the Custodian by Judge Walsh from which an appeal to this

Court was taken promptly on November 30, 1961. (App. 115). *Abe* remained in suspense.

In the summary judgment, Judge Walsh sustained the critical finding of the Director that the certificates in question were *yen obligations payable in Japan and were not dollar obligations payable in the United States*. Accordingly, the claims were to be paid at the rate of 361.55 yen to the dollar. (App. 115: 386 U.S. at pp. 489, 494; Record Item 19, Appendix I, p. 22).

(B) In this Court

The *Aratani* test case appeal was briefed and argued in this Court by the appellants on the basic issue of whether the certificates were yen obligations payable in Japan or were dollar obligations payable in the United States.

The opinion of this Court (155 App. D.C. 97, 317 F.2d 161) fully sustained the position of Carolan and Amram on this issue. In Part II(B) of the opinion (115 App. D.C. at p. 100, 317 F.2d at p. 166) this Court held that the Hearing Examiner had been right and the Director and the District Court had been wrong on this point, saying–

> "There was established thus, in our view, *an obligation in the United States to pay American claimants in dollars*, as well as the alternative obligation to honor the receipts in Japan had they been presented there." (emphasis supplied).

It thereby became *res judicata* that the Yokohama and Sumitomo certificates were all dollar obligations payable in the United States. This adjudication ran for the benefit of every holder of a Sumitomo or Yokohama certificate, including all the *Aratani* claimants, all the *Abe* claimants and all the *Honda* claimants.

Carolan and Amram's victory was unfortunately Pyrrhic at this stage, since this Court then followed with Part IV of the opinion, in which it held that, *even though* the certificates were dollar obligations payable in the United States, the Director was still correct (but for an entirely different reason) in his determination that 361.55 yen to the dollar was the proper conversion rate. This followed because of a new and previously unargued ground, the outbreak of the War and the seizure of the offices of the Banks after Pearl Harbor Day constituted a valid "excuse" to the Banks for non-performance of their obligations to redeem the certificates in dollars. The post-War conversion rate was therefore proper (115 App. D.C. at p. 107, 317 F. (2d) at p. 170).

Faced with this Pyrrhic victory, Carolan and Amram promptly moved for rehearing, which was denied, and moved for the amendment and modification of the opinion which was denied. (323 F. (2d) 427).

(C) In the Supreme Court.

Unless the Supreme Court would intervene this Court's decision in *Aratani* was the end of the line for all the yen certificate holders, all the *Aratani* claimants, all the *Abe* claimants and all the *Honda* claimants. Their certificates were all equally worthless—1¢ on the dollar.

Carolan and Amram promptly prepared and filed a Petition for Certiorari in the Supreme Court, asserting (1) a breach of due process and the right to a day in court on the newly-introduced issue of a valid "excuse" for non-performance, which had never been asserted by the Government at any prior stage of the proceeding and as to which the facts had never been developed; (2) direct conflict with opinions of the Ninth Circuit and the Supreme Court of California on this identical issue; (3) an invalid use of summary judgment procedure contrary to prior opinions of the Supreme Court.

As at all other stages of the *Aratani* and *Abe* litigation, Carolan and Amram acted alone.

The Supreme Court granted *certiorari* on October 21, 1963 (375 U.S. 877), and the appeal was placed on the summary calendar.

Immediately after the oral argument of the *Aratani* appeal in this Court, and while the parties were awaiting the decision of this Court, active settlement negotiations were undertaken, which led to a formal offer of compromise. While the Attorney-General's office was considering this offer, this Court's decision in favor of the Government was issued. The Government instantly dropped the settlement discussions. (Record Item 19, Statement of Philip W. Amram, p. 9).

However, immediately after the Supreme Court granted certiorari, the Attorney-General's office asked to reopen the settlement discussions. (*Ibid*). They proceeded swiftly to a compromise agreement to pay both the *Abe* and the *Aratani* certificate holders.

The compromise settlement resulted in the *Abe* claimants receiving net to them an amount equal to 26.133 cents per yen instead of approximately 1/4 of one cent per yen plus interest originally adjudicated by the Custodian and affirmed by the District Court and this Court. (App. 116).

On March 9, 1964, a joint motion by Carolan and Amram and by the Attorney-General was filed for both *Abe* and *Aratani* as well as for two subsidiary proceedings. This was tentatively approved by Judge Walsh, whose interlocutory opinion is reported in 228 F. Supp. 706. (App. 114).

This compromise gave each *Abe* claimant, holding a Yokohama certificate, his 26.133 cents per yen *after* Messrs. Carolan and Amram received an agreed 20% in counsel fees for their services, to cover services during both the administrative and the litigation periods.

Judge Walsh required that notice be given to all claimants of the compromise and set a final hearing for April 27, 1964. Pursuant thereto, a final consent judgment fixing the conversion value of the certificates was entered on May 18, 1964. (App. 103). *Abe-Aratani* was concluded.

(3) *The new Honda litigation.*

The *Honda* claimants, and their counsel, Messrs. Wirin and Okrand, during all the years of the *Abe-Aratani* litigation had deliberately sat on the sidelines watching the efforts of Carolan and Amram to put some value in the nearly-worthless certificates. (App. 37-38; Record Item 25, p. 3; 386 U.S. at 490-2, 499).

As the services of Carolan and Amram reached their climax, they prepared to move. Within 24 hours after the entry by Judge Walsh of his final order approving the compromise, they filed a complaint on May 19, 1964. (App. 14).

This complaint, candidly and openly, asked the District Court simply to award to the *Honda* claimants the benefit of the years of legal services of Carolan and Amram and their associates in the *Abe-Aratani* litigation and the benefit of the consent judgment they had obtained. (App. 17-18).

The Attorney-General resisted the *Honda* claim on the sole ground that the suit had not been timely filed. (Record Item 6). The Attorney-General did *not* contest the *value* of the *Honda* certificates as fixed in Judge Walsh's consent judgment in *Abe* and *Aratani*.

The District Court sustained the Government's position and this Court affirmed on appeal by a divided vote. (123 App. D.C. 12, 356 F. (2d) 351). The Supreme Court granted certiorari, 385 U.S. 917. *The only issue in the Supreme Court was whether the suit was timely filed.*

The Supreme Court's reversing opinion, written by Mr. Justice Harlan is precise and clear.

The Supreme Court stated that the sole issue was the "limitations issue". (386 U.S. at 494). It stated that it was not a case of "estoppel". To the contrary, the period of limitations was "tolled". (386 U.S. at 486, 494-5, 500).

The Supreme Court squarely held that (386 U.S. at 494-5)–

> ". . .*the limitations period was in any event tolled during the pendency of the Abe litigation, and. . . petitioners' right to bring their suit was not foreclosed.*" (Emphasis supplied)

and that (386 U.S. at 500)–

> ". . .*the statutory scheme itself requires tolling the limitations period during the pendency of the Abe litigation.*"

The Supreme Court further held (386 U.S. at 499) that the technical exclusion of the *Honda* claimants from the *Abe* complaint made no difference from a practical point of view, because the administrative proceedings had *included* the *Honda* claimants and because the exclusion–

> ". . .*made no differentiation between the total group of certificate holders in any material respect.*"

The Supreme Court finally held (386 U.S. at 500) that, since there were ample funds in the Government's possession to pay all the *Honda* claimants at the *Abe* rate, and since–

> "*these are not in any real sense government funds*" (emphasis supplied)

the *Honda* claimants should be paid "on the same basis" as the *Abe* claimants.

The Supreme Court noted that "The Government has no interest in the fund" except to see that the creditors "recover their due." (386 U.S. at 500).

(4) *Honda on remand.*

On the remand of the *Honda* case to the District Court, counsel for the *Honda* claimants and the Attorney-General reached agreement on the method for obeying the Supreme Court's opinion and on the method of paying the *Honda* claimants "on the *same basis* as that accorded the claimants in *Abe*."

Counsel for the *Honda* claimants and the Attorney-General then filed a Motion for Entry of Consent Judgment and Decree. (App. 26). In this Motion the Attorney-General conceded–

> "(4) Before the United States Supreme Court the defendant *conceded* that plaintiffs' claims were *valid and payable* except for their delay of more than 60 days in the filing of judicial suit following the 1961 promulgation of the OAP's Yokohama Specie Bank schedule." (emphasis supplied)

and that the sole reason they had not received the *Abe* payment was their delay in starting suit and the application of the limitations period.

Further the Attorney-General, in Paragraph (5) of the Motion conceded that the Supreme Court opinion indicated the "appropriateness" of paying *Honda* claimants on the *Abe* formula; and in Paragraph (6) asserted that the *Honda* claimants were "*entitled to payment*" on that formula, i.e., 26.133 cents per yen.

Finally, in the prayer of the Motion the Attorney-General asked for the award of attorneys' fees–

> "on principles similar to those underlying the award of fees in the *Abe* litigation. . ." (App. 32)

The Rauh-Wirin group, who had prosecuted the *Honda* litigation, filed their application for counsel fees in the sum of $950,000 pursuant to the Motion. (App. 33). They noted specifically that their fee request was only 10%, as opposed to the 20% that had been awarded in *Abe*; they attempted to denigrate the services of Carolan and Amram in *Abe* for the Yokohama certificate holders by suggesting that little time had been spent for them and that the time had been spent for strangers, namely, the Sumitomo certificate holders; they ignored the true fact that every minute spent by Carolan and Amram on the test case of *Aratani* was in fact spent for the *Abe* Yokohama claimants by agreement with the Government; they conceded that the Wirin group had done practically nothing during the fourteen years that Carolan and his associates were working during the administrative period, their services being limited to the filing of an *amicus curiae* brief for which they were paid $20,000.00.

The Rauh-Wirin group did not suggest the payment of anything to Carolan and Amram for their services to the *Honda* claimants out of the remaining 10% of the *Abe* 20% fee formula. To the contrary, they included a clause in the proposed consent judgment specifically designed to prevent any payment to Carolan and Amram. (App. 48).

Since neither the Rauh-Wirin group nor the Government suggested any payment to Carolan and Amram and their associates, Carolan and Amram filed a Petition, subsequently amended (App. 44, 50) which asked for fair compensation out of the remaining and unused 10% of the *Abe* fee formula, but subordinated to—

(a) the $950,000 fee to the Rauh-Wirin group

> (b) the payment in full of the 26.133 cents to all *Honda* claimants who qualified and demanded payment within the time limit fixed by the Court.

The effect was to provide payment to Carolan and Amram *only* out of residual monies in the hands of the Custodian against which no claims were asserted by anyone and in which the Government had no interest, and which would be paid over to the War Claims Fund for distribution to claimants under the War Claims Act.

Such payment, up to a total fee payment of 20%, would correspond exactly with the *Abe* formula.

Carolan and Amram also expressly, and properly, agreed that their claim for fees was only from *Honda* claimants whom they did not already personally represent under fee contracts. As to such clients, they would collect their fees, in the agreed amounts, directly from the clients. The demand here was only from *Honda* claimants who had no contractual obligation to pay fees to Carolan and Amram, for the services from which they had benefited. (Record Item 25, pp. 1-2).

Carolan and Amram asserted the following list of services rendered of which the *Honda* claimants claimed the benefit and for which counsel should be compensated:–

> (1) representation of the *Honda* claimants during the administrative period, consisting of (a) the presentation and preservation of their claims, (b) the extension of the time for the filing of their claims and (c) the defeat of the legislation which would have barred their claims.
>
> (2) prosecution of the *Abe* litigation, without which all *Honda* claims would have been substantially worthless, including (a) the reversal of the Director and the District Court in this Court's opinion in *Aratani* on the place and currency of payment of the

> *Honda* certificates, (b) the filing of the successful Petition for Certiorari in the Supreme Court, (c) the negotiation of the final settlement of 8500% of the amount awarded by the Government, the District Court and this Court and (d) the tolling of the statute of limitations for the benefit of the *Honda* claimants.

Carolan and Amram emphasized that, without these services so rendered, and particularly the services at the litigation level, there would have been nothing for any *Honda* claimant, who would have been denied any recovery at all on his Yokohama certificate.

In the Government's Opposition, the Government asked the District Court to deny any compensation to Carolan and Amram on the ground that they had not "created" any "fund", that they had not actually tolled the statute of limitations despite the language of the Supreme Court; and they had "contributed nothing" toward preserving the rights of the *Honda* claimants for ultimate recovery.

Carolan and Amram replied by asserting–

> (1) if Carolan and his associates had not prosecuted the administrative proceedings and taken their other actions during the administrative period, no *Honda* claimant would ever have received a penny.
>
> (2) if Carolan and Amram had not successfully carried through the *Abe-Aratani* litigation up to the grant of certiorari, each *Honda* certificate would have been worth 1¢ on the dollar and no more.
>
> (3) if Carolan and Amram had not initiated the *Abe* litigation, the statute of limitations against the *Honda* claims could never have been tolled.

(5) *The opinion of Judge Jones.*

On October 25, 1967, Judge Jones handed down his opinion. He refused Carolan and Amram any compensation for the services

they had rendered in the years of the *Abe-Aratani* litigation. He made an award to Carolan and his associates for the services rendered during the administrative period. (App. 58).

(A) The services during the Abe-Aratani litigation.

Compensation for the services rendered during the Abe-Aratani litigation was denied for the following reasons–

> (1) The *Abe* case did not toll the statute of limitations for the benefit of the *Honda* claimants despite the specific language of the Supreme Court's opinion, because Carolan and Amram
>
> "do not contend that the *Abe* case was instituted for that purpose." (App. 63)
>
> (2) The results obtained in increasing the value of the *Honda* certificates by nearly 100 times are immaterial because the services of counsel did not "create a fund". The "fund" was always there and Congress authorized creditors to be paid from it. (App. 64-65).
>
> (3) No *stare decisis* holding was obtained, but only an out-of-court settlement which adjudicated nothing. (App. 65).
>
> (4) The case is governed by the general principle that making a new rule of law in a particular lawsuit entitles counsel to no compensation from strangers who later take advantage of it. (App. 65).

(B) The services during the administrative period.

Compensation for the services rendered by Carolan and his associates during the administrative period was allowed on the basis that all the services during that period which were recognized by Judge Walsh in *Abe-Aratani* should be equally recognized here.

Judge Jones then computed the value of those administrative services to the *Honda* claimants as follows:–

(1) The total fee of 20% allowed in *Abe-Aratani* is not applicable here because that 20% included the litigation services which are here to be excluded.

(2) Therefore an additional 10%, over and above the 10% awarded to the Rauh-Wirin group would be excessive.

(3) A 5% fee for the administrative services would be proper.

This fee of 5% was, as Carolan and Amram had already proposed, to be subordinated to the $950,000 fee of the Rauh-Wirin Group and to the primary payment in full of 26.133¢ per yen to the *Honda* claimants. It was also to exclude, as Carolan and Amram had already proposed, any *Honda* claimants whom Carolan and Amram represented under fee contracts, (footnote 10 to the opinion) as asserted in their reply memorandum. (App. 66-68).

Counsel were directed to prepare memoranda identifying the counsel who would participate in the fees for the administrative services and providing for the proportionate division of the fees between them. (App. 68).

Judge Jones also rejected the Second Amended Petition as unnecessary and as adding nothing to what was already in the files. (App. 69).

(6) *Proceedings subsequent to Judge Jones' opinion.*

In the conformity with the order of Judge Jones, Carolan and Amram promptly filed the requested memoranda respecting the identification of counsel and division of the fees. (App. 82, 88).

One memorandum (App. 82) identified all the lawyers whose names appeared in any of the files and specified the nature and amount of their contribution. It suggested that the fees be awarded

and distribution be made in the same manner as had been ordered by Judge Walsh in *Abe-Aratani*.

The second memorandum (App. 88) accepted the 5% award on the conditions stated in the opinion, to wit–

5% of $10,500,000.00	$525,000.00
Less 5% of the claims represented by Carolan under powers of attorney to him–$1,282,200.00	64,110.00
Net fee to be awarded, subordinated as stated in the opinion	$460,890.00

On that basis, Carolan and Amram accepted the rejection of their claim for services rendered during the litigation period, and waived any exception or objection to the October 25, 1967 opinion.

The Government, however, filed Exceptions and Objections, urging the Court to reverse its grant of fees for the services during the administrative period. The Government argued that those services were worthless to the *Honda* claimants. The Government further argued that the exclusion of claims should not be limited to *Honda* claimants who employed Carolan under retainer agreements, but should also exclude all *Honda* claimants who employed any other lawyer, even if to perform some entirely different services. (App. 73).

Carolan and Amram responded to the Government's Exceptions and Objections. They re-emphasized, among other matters, the essential services rendered the *Honda* claimants in obtaining an extension of time for more than 50% of all the *Honda* claims, and in the legislative area. (App. 78).

(7) *The Final Order.*

The matter then came up on oral argument on the various papers filed subsequent to the October 25, 1967 opinion.

On April 30, 1968, Judge Jones filed his final opinion. After disposing of extraneous matters involving other issues, he turned, in Part IV of his opinion (App. 90) to the Carolan-Amram fee question.

He dismissed the Government's objections, reiterating his position that Carolan and his associates had rendered valuable services during the administrative period, specifically noting the obtaining of the extension of time for filing claims and the services in the legislative area. He reiterated that, without these administrative services there would have been no *Honda* litigation at all.

He then filed his Order (App. 93) in which he took away from Carolan and his associates substantially 100% of what he had granted in the October 25, 1967 opinion.

In the October 25, 1967 opinion he had stated that the 5% was to be computed on the basis of all the *Honda* claims excepting only those claimants who had engaged Carolan as their personal counsel. On the basis of this, as analyzed in the Memorandum filed (App. 88) Carolan and Amram had accepted the opinion.

But in the April 30, 1968 Order he stated that the 5% was to be computed on the basis of all the *Honda* claims excepting those where the claimants had engaged *any lawyer at any time and for any purpose up to and including April 30, 1968*. This included (a) lawyers engaged as early as 1948 who never did anything but help prepare a claim, never appeared at any stage of the administrative hearings and never participated in Carolan's years of administrative services up to 1958; (b) lawyers engaged between 1958 and 1968, *after* the administrative services were all completed and who never could have participated therein; (c) the Rauh-Wirin group who secured many powers of attorney from *Honda* claimants during and after 1964 in connection with the *Honda* litigation.

The net result was that a huge proportion of the *Honda* claimants were to be given a free ride for Carolan's admittedly invaluable

services to the *Honda* claimants, simply because they employed another lawyer before Carolan rendered his services and who did nothing; or because they employed another lawyer after Carolan had rendered all his services.

This appeal was promptly filed.

IV. ARGUMENT

A. THE BASIC FALLACIES OF JUDGE JONES' OPINION

(1) As to the services rendered during the administrative period.

We start off with the specific finding by Judge Jones that Carolan and his associates rendered essential legal services to the *Honda* claimants in the administrative period, for which they have never been paid and for which they are entitled to be paid.

We follow with the specific finding by Judge Jones that these services have a value of 5%, i.e. one-half the value of the services rendered the *Honda* claimants by the Rauh-Wirin group.

We follow with the express voluntary limitation of Carolan and his associates that they do not claim or want 5% of the amount of the claims of their own 712 clients, from whom they will receive 10% under their fee contracts. Carolan and his associates want to be paid only with respect to these *Honda* claimants (4,100−712 = 3,388) whom they never personally represented, and with whom they have no fee contract.

This computes (App. 88) a fee in the amount of $460,890.00, almost exactly one-half of the fee awarded to Rauh and Wirin (i.e. 5% compared to 10%). Of the utmost importance is the source of the money which will be paid to Carolan and associates.

NOT ONE PENNY WILL BE PAID BY THE 3,388 *HONDA* CLAIMANTS OUT OF THEIR OWN POCKETS.

THE FEE AWARDED WILL BE PAID ONLY OUT OF THE SURPLUS FUNDS REMAINING IN THE HANDS OF THE CUSTODIAN AFTER ALL ELIGIBLE HONDA CLAIMANTS HAVE FIRST BEEN PAID IN FULL.

THE ONLY PERSONS AFFECTED BY THE FEE PAID WILL BE THE THOUSANDS OF ANONYMOUS CLAIMANTS AGAINST THE GENERAL WAR CLAIMS FUND ADMINISTERED BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION, NOT ONE OF WHOM HAS ANY CLAIM, LEGAL OR EQUITABLE, AGAINST THE YOKOHAMA SPECIE BANK OR ANY OF ITS ASSETS.

Who, then, we may ask, has the greater equitable claim to a share of these surplus Yokohama funds, Carolan or his associates or the anonymous war fund claimants?

In Judge Jones' October 25, 1967 order he resolved the problem of the services during the administrative services on an eminently satisfactory basis. He awarded a fee of 5% reduced only by the amount of the fee applicable to the 712 *Honda* claimants whom Carolan had personally represented all through the administrative period. (See App. 64, n. 6; App. 68 and App. 68, n. 10).

Carolan and Amram, although disappointed with the refusal of Judge Jones to award any compensation for the litigation period, stated of record (App. 88) their willingness to accept the $460,890.00 fee on a totally subordinated basis, and to be paid without a penny of contribution from the 3,388 *Honda* claimants in person.

Then, in his Final Order Judge Jones changed the rules entirely and revised his October 25th opinion.

No longer was the fee to be awarded as to the 3,388 *Honda* claimants with whom Carolan and his associates never had written

fee contracts, as Carolan had already himself proposed in writing. To the contrary, the fee was now to be awarded only with respect to those *Honda* claimants who never had a lawyer at any time up to April 30, 1968.

IT MADE NO DIFFERENCE WHEN THAT LAWYER WAS ENGAGED, OR WHAT HE DID DURING THE ADMINISTRATIVE PERIOD.

IT MADE NO DIFFERENCE IF HE NEVER DID ANYTHING DURING THE ADMINISTRATIVE PERIOD, BUT SAT BY AND LET CAROLAN SINGLEHANDEDLY CARRY THE ENTIRE LOAD.

AND MOST ASTONISHING OF ALL, IT MADE NO DIFFERENCE IF THE LAWYER WAS NOT ENGAGED UNTIL YEARS AFTER THE ADMINISTRATIVE PERIOD HAD EXPIRED.

What logic or rule of fairness can sustain such a decision?

If Judge Jones had said to Carolan and his associates—You must share the $460,890.00 with all other lawyers who actually rendered services to you and to the *Honda* claimants during the administrative period, i.e. who entered their appearances and did actual work with you in the years of proceedings before Hearing Examiner Carr, or who worked with you in your negotiations with Custodian Bazelon for the extension of time for filing claims, or who worked with you in the Congress to defeat the destructive legislation – no possible objection could have been made.

Such limitations would have meant nothing. The record is clear and the Government has carefully refrained from asserting the contrary – that no one else appeared or participated in the hearings before Hearing Examiner Carr except Messrs. Wirin and Okrand who did nothing but file an *amicus* brief and who have already shared

the $950,000.00 fee to *include those services;* that no one but Carolan and his associates handled the extension of time question with Custodian Bazelon; and that no one but Carolan and his associates touched the question of defeating the destructive legislation.

This, in effect, is what Judge Jones *did* say in the October 25, 1967 opinion. If he had held to this in the Final Order. Carolan and Amram would never have filed this appeal.

Why, we may ask, would that position be modified?

If all the money paid as fees to Carolan and his associates, for services to the 3,388 claimants *whom he did not personally represent,* is to be paid out of the residual funds and *not by the claimants themselves,* what relevance has the fact that these clients had other lawyers *who did nothing at all in connection with preserving their clients' rights during the administrative period?*

If the *Honda* claimants were asked to pay Carolan's fees out of their own pockets, while at the same time they had to pay 10% to their lawyers under their voluntary fee contracts with these lawyers, an entirely different case would be presented. The present argument could not be made.

But here the only question is – how much should Carolan receive out of the residual funds for services rendered to the 3,388 claimants, and *which those claimants themselves will not have to pay?*

Whether a particular claimant had a lawyer or not at any time is irrelevant to this question. The relevant question is did that lawyer perform any services during the administrative period? If so, that lawyer should be paid *out of the residual fund* for these services; if he did nothing, Carolan should be paid *out of the residual fund.*

The strangest of all the provisions of Judge Jones' Final Order is the use of the words "heretofore given powers of attorney to counsel or have not otherwise retained or contracted for legal services of counsel".

What this means is this. Assume that a particular *Honda* claimant never had a lawyer at any time during the administrative period and permitted Carolan and his associates to act for him during all that period up to its termination in 1958.

Then during the *Abe-Aratani* period he likewise did nothing, but watched Carolan and Amram and their associates prosecute that litigation.

Then, finally, in 1964, *after* Rauh and Wirin commenced the *Honda* suit, they solicited his participation and he gave them his power of attorney to represent them in that litigation. We venture the guess that hundreds and maybe nearly all of the 1,120 *Honda* claimants who have retained Wirin and Rauh will fall in that category. (See 386 U.S. at 490, n.6)

What relevance does such a 1964 retention of counsel have in determining how much Carolan and his associates should be paid *out of the residual funds* for services rendered between 1947 and 1958? Why should the services to that claimant be excluded? Judge Jones does not say, and the writers of this brief even with the wildest use of their imagination, cannot find an answer.

Let us repeat that the award of $460,890.00 for the administrative services, payable only out of surplus funds and subordinated to the prior payment to qualifying *Honda* claimants at the rate of 26.133 cents per yen, will be satisfactory to Carolan and his associates. They will agree to share the fee equitably with all other lawyers who are entitled to share in it because they actually rendered services (not previously paid for) in the adminstrative hearings before

Hearing Examiner Carr, in the negotiations for extension of time with Custodian Bazelon and in the successful defeat of the destructive legislation.

(2) *As to the services rendered during the Abe-Aratani litigation.*

The whole thrust of the *Honda* litigation, from the original complaint to the Supreme Court's opinion and the Rauh-Wirin Petition for Counsel fees is single – identify *Honda* exactly with *Abe.*

What did *Abe* provide? It provided 26.133¢ per yen for qualified Yokohama Certificate holders, and, in addition, a *20% counsel fee paid out of the residual funds and not out of the 26.133¢ payment.*

What has been provided in *Honda?* So far, 26.133¢ per yen for qualified Yokohama certificate holders, and so far, *10% in counsel fees paid out of the residual funds and not out of the 26.133¢ payment.*

Therefore, to equalize the two cases, an additional 10% in counsel fees is presently unawarded and available.

Entirely apart from legal authorities and doctrine, simple logic compels the award of these fees to Carolan and Amram and their associates.

Judge Walsh in his Final Order, *with the consent of the Government,* adjudicated that the totality of the legal services during the seventeen years from 1947 to the end of *Abe-Aratani* in 1964 clearly warranted counsel fees in the amount of 20%. (App. 118-120)

Honda began the day after *Abe-Aratani* ended. It based its entire case on the foundation of *Abe-Aratani* and on the foundation of the results accomplished and the services rendered in that litigation. But *Honda* had to go farther. Here counsel had to

wrestle with the additional limitations problem not present in *Abe-Aratani*.

If the *Honda* result required *everything* in *Abe-Aratani plus* the new and additional services on the limitations issue, how can the total fees payable out of the residual funds be *less* than the 20% in *Abe-Aratani*?

If there is to be any logical difference between the two cases, the fees should logically be *greater*, because the combination of *both* sets of services was essential to recovery by the *Honda* claimants. Twenty-one years of lawyers' time were needed, as opposed to seventeen years.

Rauh and Wirin claimed fees of only 10%, i.e. half the total figure agreed to by the Government and the District Court in *Abe-Aratani*. In other words, their four years of services were valued by them at half the value of the seventeen years of services in *Abe-Aratani*.

This was modest and fair and Carolan and Amram stated of record their concurrence in the fairness of this fee (App. 88).

If this be so, what rule of logic or fairness dictates that a request for equality of treatment by Carolan and Amram and their associates is inequitable and unfair?

If everything was already done for the *Honda* claimants except the limitations problem, is an equal division of the 20% in fees for the totality of services unfair?

Is the equating of 10% for the *four* years of *Honda* litigation with 10% for the *seventeen* years of *Abe-Aratani* administrative litigation services unfair, particularly where the clients pay nothing and the fees are paid out of other sources?

If *Abe-Aratani* alone is worth 20%, how can *Abe-Aratani plus Honda* be worth less than 20%?

Judge Jones' opinion does not meet these essential questions. They are not discussed; they are not answered.

Instead, Judge Jones rejected all claims by Carolan and Amram for any fees during the *Abe-Aratani* litigation on legal grounds, based on his interpretation of the authorities.

We believe we can show convincingly that he was wrong.

(B) THE LEGAL ERRORS IN JUDGE JONES' OPINION

We have already pointed out that Judge Jones made an award to Carolan and his associates for services rendered during the administrative period. The only question here is the *amount* of that award and the equity and reasonableness of the limitations and restrictions which Judge Jones imposed upon the computation of that amount.

Accordingly, there are no "legal questions" involved in this phase of the appeal.

On the other hand Judge Jones denied any recovery for the services of Carolan and Amram for the services in *Abe-Aratani* litigation. He gave the following reasons:

> (1) The services of counsel did not create any "fund". (App. 64)
>
> (2) *Abe-Aratani* created no "stare decisis" situation respecting the value of the *Honda* certificates. (App. 65)
>
> (3) The *Abe-Aratani* litigation did not toll the statute of limitations for the benefit of the *Honda* claimants. (App. 63–64)

All three reasons are demonstrably wrong and contrary to the record and the authorities.

(1) *The authorities.*

We start the discussion of the authorities against the background of the uncontrovertible fact that the *Honda* group would never have received a penny in the absence of the Carolan-Amram group's legal services in the *Abe* litigation from 1961 to 1964.

First – if *Abe* had not been commenced and if *Abe*, through *Aratani*, had not been fought to the Supreme Court level, every *Honda* certificate would have been worth 1¢ on the dollar instead of nearly 100¢ on the dollar. The 1¢ value fixed by the Director, by the District Court and by this Court would have been *res judicata*.

Second – if *Abe* had not been commenced and if *Abe*, through *Aratani*, had not been fought to the Supreme Court level, the *Honda* claimants could never have overcome the bar of the statute of limitations, and the "equitable tolling principle", which the Supreme Court applied, would never have been applicable.

It is hornbook law that counsel, who prosecute an action for one or more members of a large group of creditors, to establish their rights in a fund already before the court, are entitled to compensation, not only with respect to the particular clients for whom they prosecuted the action, but also with respect to all other members of the creditor group who later and independently claim the same benefits from the fund. *A fortiori* is this true where the initial action prosecuted serves to toll an otherwise destructive statute of limitations, for the ultimate benefit of the second and following group.

The principles invoked are fundamental principles of equity. One who claims the benefits of another's services cannot seek a "free ride". All persons equally benefited must share in the compensation of the attorneys who made the benefits possible.

There are three cases generally referred to as the "leading cases" on the subject.

The first is *Trustees v. Greenough*, 105 U.S. 527 (1882). Here a single holder of certain bonds sued to recover for mismanagement and waste by trustees. He was successful and a large fund was made available for *all* bondholders. Counsel was awarded a fee based on the entire fund.

The second is *Sprague v. Ticonic Bank*, 307 U.S. 161 (1939). Here a single depositor in a bank, which became insolvent, sued to create a "trust" status for her deposit. She was successful and thereby created the same priority status for fourteen other accounts. The lower courts refused counsel fees with respect to the fourteen accounts. Justice Frankfurter pointed out that there were three separate situations where fees were proper.

(1) situations where there is a true class action brought for the entire class,

(2) situations *where the entire class is not included* and the remaining members of the class benefit from the action,

(3) situations where there is no class suit whatever but the doctrine of *stare decises* establishes the status of outside persons.

Justice Frankfurther made other important points.

(1) There is no need for counsel to bring a class suit for all members of the class.

(2) There is no need to create a "fund".

(3) Creating a "*stare decisis*" situation will be sufficient.

(4) The duty of the chancellor is to "do equity in a particular situation".

The third is *Wallace v. Fiske*, 80 F. 2d 897 (8th Cir. 1935). Here one of several remaindermen of a trust fought a battle alone to secure certain stock as against the life tenant. He was successful and the remaining remaindermen automatically benefited. The court assessed counsel fees against all the other remainder interests, even though they had initially repudiated the action which had been brought and had opposed it initially. When they later sought the the benefits of the decree, they had to pay counsel who had obtained it.

The other remaindermen raised two questions which are relevant here.

> (1) counsel had not really brought a "fund" into court,
>
> (2) counsel had already been well-paid by his own client

The court dismissed both objections and awarded the fees requested. The court found (1) that there was *no* class suit, and that this was immaterial, (2) that the acceptance of the *benefits* of the successful action was the key factor.

The court went even farther. It held that counsel are entitled to compensation even with respect to parties who *opposed* the action if they later seek its benefits.

Judge Haynesworth in the Fourth Circuit has neatly summarized the general principles in *Gibbs v. Blackwelder*, 346 F. 2d 943 (1965) in the following language:

> "It is founded upon the principle that when one who, while establishing his own claim, also establishes the means by which others may collect their claims, a chancellor in equity may award counsel fees to the trail blazer out of the property made available for the satisfaction of all claims. The principle is ap-

> plied so that the one who led in hewing the path to victory is not left saddled with extensive attorney's fees, which need not be incurred by his more timid fellows who held back until the fruits of the pioneer's success were laid before them." (346 F. 2d at p. 945)

The general principles are collected in extended Annotations in 49 A.L.R. 1149 and 107 A.L.R. 749.

The essence of all the cases is that the chancellor is to act in conformity with equitable principles.

Several decisions of this Court are of interest.

Doherty v. Bress, 104 App D.C. 308, 262 F. 2d 20 (1958) involved the Eastern Air Lines collision, where a single test case was prosecuted on which all the other cases would rest. After the test case was completed in favor of the plaintiff, counsel in the test case sought a fee from one of the other plaintiffs, who had benefited therefrom. Our Court of Appeals awarded the fee on the principles of *Sprague, supra*, pointing out specifically:

> "The absence of a formal relationship of attorney and client is not decisive." (262 F.2d at p. 22)

The Court referred to "the exercise of an equitable discretion", and disregarded the fact that no "common fund" had been created by the services.

This case is distinguishable because there was an agreement between the parties with respect to the "test case" aspect. Nevertheless it is relevant because of this Court's acceptance of the *Sprague* principles and the decision that no "creation of a fund" is requisite.

Lafferty v. Humphrey, 101 App D.C. 222, 248 F. 2d 82 (1957) involved litigation brought on behalf of one county and designed to benefit a number of counties in Oregon from land grant funds. The

counties, other than the plaintiff county, opposed the payment of fees to counsel on the ground that they had never employed him specifically, and also on the ground that the lawyer's services had not benefited them because the Congress had legislatively provided for the grant of funds. Both defenses were rejected and counsel were paid.

This Court relied again on *Sprague* and found that the Act of Congress had merely ratified the prior judgment of Court and had added nothing. The Court stressed the point that the counties had *accepted the benefits of the litigation.*

Perhaps the most interesting and the most important of all the decisions in this Court is *Whittier v. Emmet,* 108 App. D.C. 191, 281 F. 2d 24 (1960). In this case a suit was brought to recover certain alleged overpayments of premiums by servicemen on life insurance policies. The plaintiffs sought counsel fees, under the *Sprague* doctrine, from the 8,400 veterans who would benefit from the refunds.

But the Court of Appeals denied the claim, for the simple reason that all but a handful of claimants were barred by the statute of limitations, and that the statute had not been tolled by the plaintiffs' suit, but had been tolled *solely by an Act of Congress.*

> "Many of those claims would have been defeated by technical defenses, statutes of limitation, voluntary payments, or *res judicata,* except for the waiver of such defenses by Congress as set forth in Public Law 85-586. In that Act, Congress made available the Civil Relief Fund and other funds for reimbursement of the veterans entitled to it.
>
> "From the small number of claimants who have joined these actions during the four years since the litigation was commenced, it is probable that few

> will join before judgment. Of the nine present intervenors, only two were not parties to one of the class suits or to Plesha. Few more, if any are likely to join now in view of Public Law 85-586. *The saving of so few, out of about 8,400 claimants, from the operation of the statute of limitations, is not an adequate reason for imposing attorneys' fees upon all 8,400 litigants.*" (281 F.2d at p. 32) (Emphasis supplied.)

In *Honda*, we have the exact opposite. Here we have a direct statement by the Supreme Court that the bringing of the *Abe* suit, and that alone, tolled the statute of limitations for all 4,100 of the *Honda* claimants. To paraphrase *Whittier:*

> "The saving of so many, 4,100 claimants, from the operation of the statute of limitations is an adequate reason for imposing attorneys' fees upon all 4,100 litigants."

The final authority is *Agajan v. Clark*, 127 App. D.C. 158, 381 F. 2d 937 (1967). Judge Fahy wrote for himself, and Judges Burger and McGowan, an opinion dealing with another aspect of "tolling" in an enemy property case. In the opinion, Judge Fahy carefully examined *Honda* and summarized its holding as follows: (127 App. D.C. at p. 161, 381 F.2d at p. 940)

> "... the pendency of the suit of one of the creditors to determine whether the value of the claims was to be calculated at the rate of exchange at the time of vesting or at the inflated post-war rate, tolled the time within which the suits of these other creditors need be filed."

(2) *Judge Jones' Treatment of the Statute of Limitations*

The Supreme Court opinion in *Honda*, at two different points specifically decides that the commencement of the *Abe* suit by Carolan and Amram tolled the statute of limitations which had been asserted by the Government as an irrevocable bar to the *Honda* action.

The Court first said (386 U.S. at 486) –

> ". . .for reasons discussed in this opinion the period of limitations was tolled, requiring reversal of the judgment below."

The Court later said (386 U.S. at 494-5) –

> ". . .we consider that the limitations period was in any event tolled during the pendency of the *Abe* litigation and that petitioners' right to bring their suit was not foreclosed."

The Court then proceeded to analyze carefully the Trading with the Enemy Act and its statutory intent and legislative purpose (386 U.S. 495-8), interpreting it by the use of the Bankruptcy Act as an analogy.

The Court then closed the discussion with the conclusion (386 U.S. 500) –

> ". . .we hold that the statutory scheme itself requires tolling the limitations period during the pendency of the *Abe* litigation."

As the Supreme Court interpreted the Act of Congress, if any member of a creditor group brings a timely Petition for Review to reverse an adverse decision of the Custodian, i.e. within 60 days from the Custodian's Final Schedule, the review proceedings will toll the statute of limitations for the benefit of every other member of the creditor group. When the initial proceedings are terminated, all

the others may then bring proceedings, without being barred by the statute of limitations and their failure to bring review proceedings within 60 days from the date of the Custodian's Final Schedule.

We must not forget that both the District Court and this Court had dismissed the *Honda* suit because of the bar of the statute of limitations, the only defense asserted by the Government. The reversal of the Supreme Court was predicated *solely and exclusively* upon the effect of the *Abe* litigation as tolling the statute.

Yet, in the face of this, Judge Jones reaches the strange conclusion that (App. 63)

> ". . .It is difficult to understand how it can be said that their services in *Abe* were used by the *Honda* plaintiffs to toll the statute of limitations."

The Supreme Court had no difficulty; it found that the commencement of the *Abe* litigation was the *sole and exclusive* ground on which the *Honda* plaintiffs could overcome the bar of the statute. No other grounds were suggested.[4]

Judge Jones then suggests several reasons why he differs with the Supreme Court.

First – he suggests that the Sumitomo Bank was insolvent, while the Yokohama Bank had millions of dollars in surplus assets. This *non sequitur* is not explained. How the insolvency of the Sumitomo Bank can affect the statute of limitations applicable to the Yokohama claims remains unexplained in Judge Jones' opinion. How can the legal effect of the *Abe* litigation depend on the solvency of a separate and disconnected institution? The Supreme Court was determining whether the *Honda* claimants, holding Yoko-

[4] Judges Fahy, Burger and McGowan likewise had no difficulty in their *Agajan* opinion, *supra*.

homa certificates, could recover and it held that the commencement by Carolan and Amram of the *Abe* case permitted the *Honda* claimants to escape the statute of limitations.

Second – he suggests that Carolan and Amram did not start the *Abe* case for the express purpose of preserving the statute of limitations for the benefit of the *Honda* claimants. The point is, however, that their intention is immaterial. No matter what they intended, the legal result was that they *did* toll the statute and the *Honda* claimants *did* take advantage of what they did as the *sole and exclusive* way to escape the statute. In *Greenough, Sprague* and *Wallace, supra,* there is no suggestion anywhere in any of the opinions that counsel who initiate the first claim must have the specific intent of aiding the outsiders. Every opinion is to the contrary. The issue is not what the initial litigators intended; the issue is whether the outsiders later come in to *claim the benefits* of the initial litigation. Actually the cases go so far (*Wallace, supra*) as to award counsel fees even where the outsiders actively oppose the initial litigation, but later come in, after the success, and claim its benefits.

Third – he suggests a failure to submit evidence of the solvency of the Yokohama fund, in August, 1961, and the knowledge of counsel of such solvency at that time. How this bears on the issue of the tolling of the statute of limitations is not made clear. Here again Judge Jones states the principle that the intention of the initial litigator is the important thing; whereas the cases say that it is the claim of the outsiders for the benefits that is the vital factor.

As to the financial status of the Yokohama fund, no one ever raised a question about this at any time. Everyone took it for granted that there were millions of dollars in the fund the day *Abe* was started and the day *Abe* was settled.[5]

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[5]See Judge Wright's dissenting opinion in *Honda*, 123 App. D.C. 12, 356 F.2d 351.

Messrs. Wirin and Rauh knew all about the *Abe* settlement and the payments to be made thereunder to the *Abe* claimants. If there had been the slightest question about the availability of money to pay the *Honda* claimants after the *Abe* settlement was consummated, would careful lawyers like Messrs. Wirin and Rauh have let the *Abe* distribution be made without intervening immediately to protect their clients? Quite the contrary; they let *Abe* go through, while they started their own suit independently. They knew, like everyone else, that there were still millions in the Yokohama fund after the *Abe* settlement was consummated. (App. 38-39)

Finally, the Supreme Court asserted the uncontradicted fact, that there were ample funds to pay all the *Honda* claimants at the *Abe* rate. (386 U.S. at 500)

And again we may ask – what relevancy has this point to the issue of whether the *Abe* case tolled the statute of limitations for the *Honda* claimants?

The Supreme Court was very specific in finding the *Abe* litigation to be the *sole and exclusive* ground for exempting the *Honda* claimants from the bar of the statute of limitations. Judge Jones' repudiation of that Supreme Court finding cannot stand.

(3) *Judge Jones' Treatment of the 8500% increase in the in the value of the Honda certificates*

Judge Jones also found that the services of Carolan and Amram in *Abe-Aratani* in reversing the Custodian, the District Court and this Court, through the successful Petition for Certiorari and the ensuing consent judgment fixing the value of the certificates at 26.133 cents per yen, conferred no benefits upon the *Honda* claimants. The reasons are interesting and strange.

First, Judge Jones suggests that Carolan and Amram's services "did not create a fund for anyone." (App. 64) He suggests that

the fund was already there and that the Trading with the Enemy Act created the fund.

How then, we may ask, did the Government, Messrs. Rauh and Wirin and Judge Jones, all agree that Messrs. Rauh and Wirin were to be awarded $950,000.00 for their services to the *Honda* claimants from

> "*the fund made available* by the successful efforts of plaintiffs' counsel in this litigation." (App. 34)

based upon the foundation that Carolan and Amram had made a "fund . . . available" in *Abe*?

How could that award have been based upon the principles of *Greenough*, *supra*, and the charge of fees against the "fund"? (App. 42, n. 2)

If Judge Jones and the Government agreed that Rauh and Wirin had "created a fund," and that Carolan and Amram had "created a fund" in *Abe*, how can it follow that there suddenly was *no fund at all created by anyone* when Carolan and Amram ask for counsel fees here?

What did Rauh and Wirin accomplish? They successfully settled the legal right of the *Honda* claimants to recover from the Yokohama fund (already in existence) from which the Government had barred the *Honda* claimants. What did Carolan and Amram accomplish? They successfully settled the value of the *Honda* certificates at 8500% of the figure the Government asserted.

Each contributed an essential element to the ultimate recovery by the *Honda* claimants of 26.133 cents per yen on their certificates. If Rauh and Wirin had not contributed their services, the *Honda* claimants would have received nothing at all. If Carolan and Amram had not contributed their services, the *Honda* claimants would have received a little over 1% of what they did receive.

There is no difference whatever between the nature of their contribution to the "fund." Both sets of services were needed to provide the ultimate recovery. Each set of counsel is entitled to be paid on exactly the same legal and equitable principles.

It is impossible for Rauh and Wirin to be paid on the basis that they made a "fund . . . available" to the *Honda* claimants and at the same time to assert that Carolan and Amram may not be paid because they did not make a "fund . . . available" to the *Honda* claimants.

Further, the authorities and especially Justice Frankfurter in *Sprague* make it crystal clear that the "creation of a fund" is not a prerequisite to the recovery of counsel fees.

It is not necessary, says Justice Frankfurter, to have a class suit at all; it is not necessary to show "creation of a fund." It is enough if the services of counsel create a "*stare decisis*" situation which enables an outsider to come in and claim benefits.

We submit that there clearly was a fund created here and the award to Carolan and Amram in *Abe* and the award to Rauh and Wirin in *Honda* settle the question. But even if not, there was clearly a *stare decisis* situation here as will be shown in the following analysis.

Second. Judge Jones suggests that there was no *stare decisis* situation here (App. 65). His position is that there was no adjudication of the value of the certificates but simply an "out of court agreement" of compromise, which settled nothing except that the compromise was "fair and reasonable." This position is contrary to the record, and to the authorities.

So far as the record is concerned, the following items are relevant.

The Supreme Court held that, as a practical matter, the *Abe* litigation on the value of the certificates was for the benefit of every certificate holder and that it

> ". . . made no differentiation between the total group of certificate holders in any material respect." (386 U.S. at 499)

The Honda complaint asserted in its closing prayer for relief that the *Honda* claimants be paid in the "same conversion ratio" as *Abe*. (App. 18-19).

Paragraph 5 of the Rauh-Wirin Petition for Counsel Fees asserts that the *Honda* claimants are to be paid "at the same conversion ratio" as *Abe*. (App. 35).

The *Honda* claimants themselves asserted that they regarded the *Abe-Aratani* litigation as brought to settle the value of their certificates also. (386 U.S. at 490-3)

In the Joint Motion for the Entry of Consent Judgment filed by Messrs. Rauh and Wirin and by the Attorney-General (App. 28), the Government admitted specifically that it had conceded before the Supreme Court that the *Honda* claims were "valid and payable" except for the sole defense of the statute of limitations. Further, both the *Honda* claimants and the Government specifically agreed that–

> ". . . the plaintiffs are now *entitled to payment* by defendant on the same basis accorded *their fellow-claimants* in the *Abe* litigation (26.133 cents per yen) . . ." (Emphasis supplied) (App. 29)

How could the *Honda* claimants be "*entitled*" to payment and how could they be "fellow-claimants" unless the *Abe* decree was either *res judicata* or *stare decisis*?

Judge Jones ignored the authorities on the effect of the *Abe* consent decree.

> "We reject the argument of the intervenors that a decree entered upon consent is to be treated as a contract and not as a judicial act". Cardozo, J. in *U.S. v. Swift & Co.*, 286 U.S. 106, 111 (1932).
>
> "A consent decree, although based upon an agreement of the parties rather than a finding of fact by the court, is not a mere authentication or recording of that agreement. It is a judicial act. . ." Maris, J. in *U.S. v. Radio Corp. of America*, 46 F. Supp. 654 (1942).

Chief Judge Clark, then the country's greatest expert in federal civil procedure, held, in *Stella v. Kaiser*, 218 F.2d 64 (1954) that a court-approved compromise settlement of a class suit is as binding as a judgment resulting from an adverse proceeding, whether it is treated under the rubric "*res judicata*" or the rubric "estoppel".

The binding effect of a court-approved consent decree in settling litigation applies as well to cases in which the United States is a party. *U.S. v. International Harvester Co.*, 274 U.S. 693 (1927); *U.S. v. Swift & Co., supra; Columbia Artists Management v. U.S.*, 381 U.S. 348 (1965).

Accordingly, the suggestion of Judge Jones that the *Abe* consent judgment was only some sort of informal proceeding and had no *stare decisis* quality, is contrary to the facts of this case, to the decisions, and to the unqualified admission of the Government to the contrary.

Third, Judge Jones suggests that, even if *Abe* is *stare decisis*, Carolan and Amram must lose their claim for compensation because this situation is governed by the general rule that counsel who secure the announcement of a new rule of law cannot claim compensation from total strangers who later come in to take advantage of it for themselves.

We agree that the rule stated by Judge Jones exists and is a correct rule, but it is clear it has no application to this case. A good illustration of it is the recent District Court case of *Schleit v. B.O.A.C.*, decided by Judge Holtzoff on April 10, 1968. Here plaintiff represented certain airlines on whose behalf he secured the elimination of certain charges. B.O.A.C. had not retained him and had not participated in the proceedings. However, B.O.A.C. found itself later able to get the benefit of the favorable result. Plaintiff then sought a fee from B.O.A.C. This was properly refused. Here no "fund" was involved; no "class" was involved; no "common creditors" were involved; no "fellow-claimants" were involved. B.O.A.C. was a total stranger.

But in the *Honda* case, the Supreme Court specifically found that the *Abe* claimants and the *Honda* claimants were all part of the same total group, the holders of identical Yokohama certificates. They were really *all one class* and had been so treated in the administrative proceedings. (386 U.S. at 499). But in the District Court and in this Court and the Supreme Court, the single class was broken down into two sub-classes. As to one vital issue, the statute of limitations, the situation of the two sub-classes was different. As to the other vital issue, the value of the certificates and the yen conversion rate, the two sub-classes were identical. (See 386 U.S. at 499-500).

In addition, *the Government admitted this unconditionally*. In the Joint Motion for Consent Decree, the Government designates the *Honda* claimants and the *Abe* claimants as "fellow-claimants". This is precisely correct. As to the issue of the value of the certificates, there is no difference between them. They are all members of the same class; they are all common creditors against the fund in the hands of the Custodian; no one of them is a total "stranger" to the others. (App. 29).

The doctrine suggested by Judge Jones, and illustrated in *Schleit, supra*, is inapplicable.

May we close this section of the argument by re-emphasizing the categorical statement of Mr. Justice Frankfurter in *Sprague, supra*, at pp. 166-7 that, in determining if counsel fees should be awarded–

(1) there need be no class action at all.

(2) there need be no "fund" established.

(3) the key question is whether the lawyer in question "makes a fund *available* to others".

(4) *stare decisis* is enough, if related outsiders come in to take advantage of the prior work.

(5) common creditors against a fund is an appropriate situation.

Justice Frankfurter's criteria are met squarely by Carolan and Amram and their associates in their work in *Abe-Aratani* and in the subsequent actions and positions of the *Honda* claimants and their counsel.

V. CONCLUSION

For the reasons heretofore set forth, appellants respectfully request the Court to reverse Judge Jones' decision and to order as follows:

(1) Award to Carolan and his associates for their services during the administrative period a fee of $460,890.00 to be paid without conditions, to the extent that surplus funds remain in the Yokohama Specie Bank account in the hands of the Custodian after paying the $950,000.00 fee to Messrs. Rauh and Wirin and after reserving sufficient funds to pay all qualified *Honda* claimants pursuant to the Final Decree of April 30, 1968 and to be paid solely from such surplus funds.

(2) Award to Carolan and Amram and their associates, for their services during the *Abe-Aratani* litigation, a fee of $489,110.00 (the combined fees under (1) and (2) to aggregate $950,000.00) payable, in the same manner as in (1) above, and also payable solely from such surplus funds.

(3) If both (1) and (2) are awarded as requested and there is not sufficient surplus funds to pay both fees, they shall be pro-rated.

(4) Carolan and Amram, respectively, shall assume the responsibility, as officers of this Court, of meeting all claims by Alfred Gitelson or any other attorneys for any share in the respective fees awarded, as proposed in the Memorandum of Petitioners re Identification of Counsel and Division of Fees of record herein.

(5) To the extent that this matter cannot be definitively disposed of because of the existence of an essential matter of fact which has not been heard below, and as to which appellants have not had a "day in court" remand the case to the District Court for such further proceedings as may be appropriate.

Respectfully submitted,

Thomas H. Carolan, Esq.
Philip W. Armam, Esq.
Appellants pro se

Bardyl R. Tirana, Esq.
Amram, Hahn & Sundlun
700 Colorado Building
Washington, D. C. 20005
Attorney for Appellants

Nos. 22188 and 22193

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRUIT

AYAKO HONDA, et al.

THOMAS H. CAROLAN
and
PHILIP W. AMRAM

Appellants

v.

JOHN N. MITCHELL, Attorney General of the United States

Appellee

v.

AYAKO HONDA, et al.

v.

JOHN N. MITCHELL, Attorney General of the United States

Appellant.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES

WILLIAM D. RUCKELSHAUS
Assistant Attorney General

IRVING JAFFE
ALAN S. ROSENTHAL
JOHN R. FRANKLIN
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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IN THE UNITED STATES COURT OF APPEALS
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Appellants

v.

JOHN N. MITCHELL, Attorney General of the United States

Appellee

v.

AYAKO HONDA, et al.

v.

JOHN N. MITCHELL, Attorney General of the United States

Appellant.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The district court denied counsel fees to the petitioners which had been sought on the basis that the plaintiffs in this cause benefited from their legal services rendered to others in the earlier Abe-Aratani litigation. The district court did, however, award counsel fees to all counsel, including petitioners, who may have performed services of benefit to yen certificate of deposit claimants, including the plaintiffs, during administrative stages of proceedings in the Office of Alien Property. The questions are:

1. Whether petitioners are entitled to an award of counsel fees from plaintiffs as between "solicitor and client" on the basis of the successful conclusion of an earlier litigation, by compromise, for a different group of debt claimants, where (a) the two groups are in different classes; (b) the plaintiffs here were required to institute new litigation in order to acquire subordinate rights to the first group; (c) where petitioners created no fund out of which plaintiffs could be paid; and (d) where, as a result of the earlier litigation, plaintiffs did not become entitled by stare decisis, or otherwise, to receive any payment.

2. Whether the petitioners, or any counsel, are entitled to an additional award of counsel fees from the plaintiffs,

over and above that provided in their retainer agreements, for services rendered during the administrative stages of proceedings before the Office of Alien Property, which were concluded not later than May, 1961, by which time the claims of all plaintiffs here had already been dismissed and disallowed as abandoned and they were therefore entitled to nothing.*/

COUNTERSTATEMENT OF THE CASE

This appeal relates to an application for counsel fees by petitioners-appellants based on the contention that their legal services in the Abe-Aratani litigation and during the administrative stages benefited the Honda plaintiffs in this case. District Judge William B. Jones, by memorandum of October 25, 1967 and by order and opinion of April 30, 1968, denied to petitioners any counsel fees in this case for services rendered in the Abe-Aratani litigation but did award counsel fees to all counsel, including petitioners, who may have performed services during the prelitigation administrative stages of the Yokohama Specie Bank (YSB) yen certificate

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*/ In accordance with Rule 8(d) of the rules of this court, the court is informed that the pending case was before this court previously under the name of Honda v. Katzenbach, No. 19,284, and is reported at 123 U.S. App. D.C. 12, 356 F.2d 351 (1966),

claims. Petitioners appeal from that order and the Government has cross-appealed from so much of the order as awards any counsel fees for legal services during the administrative stage. The pertinent facts follow.

After the outbreak of war with Japan, the United States, early in World War II, seized the assets of Japanese nationals located in the United States, including the assets of the Yokohama Specie Bank, Ltd., which were ultimately transferred to the Alien Property Custodian (Custodian) pursuant to his seizure order. (App. 15).[1/] A 1946 amendment to the Trading with the Enemy Act (50 U.S.C. App. 34), permitted citizen or United States resident creditors to file administrative debt claims against such vested property. Approximately 7,500 holders of YSB yen certificates of deposit filed creditor claims for payment under the amended statute.

Because a question arose as to the proper rate of redemption (prewar or postwar) of the certificates, an administrative determination of that issue was undertaken in

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1/ References to pages of the printed appendix are designated "App ___." References to the original record are designated by "R. Item ___." The items are those listed by number in the Index of Record, which appears in the Appendix at pp. 10 to 14.

a consolidated proceeding under the name of one of the depositors, Kunio Abe. Abe contended for the prewar conversion ratio of about 23.4 cents per yen. (App. 113).

After extensive consolidated hearings before a Hearing Examiner on the yen deposit claims of former depositors of both the Yokohama Specie Bank, Ltd., and the Sumitomo Bank, Ltd., the Director of the Office of Alien Property, on November 13, 1957, rejected the contrary recommendation of the Hearing Examiner and took the position, similar to that taken by the banks in Japan and the courts in California, that the certificates were payable at the postwar rate of exchange, or 361.55 yen to the dollar under the "judgment day" rule since the certificates of deposit, contractually, were payable in yen in Japan. (App. 20, 101, 112).

Yen certificate holders were thereafter notified that their claims could be allowed at the postwar rate of exchange; they were also requested to submit their certificates of deposit, otherwise their claims would be dismissed as abandoned. A number of claims were withdrawn, and a large number were dismissed as having been abandoned when no response was received by the Custodian. It was determined that 1,817 claims were allowable and payable, at the postwar rate. (App. 112). The administrative determination of eligibility for payment of each claimant was made between

1957, after the Director's decision and the time when the final schedule was filed.

In accordance with the provisions of Section 34(f) of the Act, the Custodian in May 1961, prepared and served upon all YSB claimants, i.e., on those whose claims were allowed and on those whose claims had been dismissed (but not on those who had withdrawn their claims), a final schedule listing all debt claims which were allowed and the proposed payment to be made to each such claimant. (App. 24, 25, 112).

A complaint for review was timely brought under Section 34 (f) of the Act by attorneys Carolan and Amram on behalf of all the YSB yen certificate of deposit claimants whose names appeared on the final schedule, i.e., on behalf of those whose claims had been allowed at the postwar rate of exchange. Abe v. Kennedy, Civil Action No. 2529-61. (App. 110, et seq.) Likewise, suit earlier had been filed by Carolan and Amram on behalf of the similarly situated Sumitomo Bank claimants, Aratani v. Kennedy, Civil Action No. 3164-58, following publication of the Sumitomo Bank's Final Schedule on October 24, 1958. (App. 99, et seq.).

The Abe complaint asserted that the claims should have been allowed by the Custodian at the higher prewar rate of exchange of 23.4 cents per yen. (App. 113).

Neither before nor after the publication of the final schedule as to YSB claimants did the claimants whose claims had been disallowed and dismissed (the current Honda group) seek judicial relief, under Sections 34(e) or (f) of the Trading with the Enemy Act, until such time as the Abe-Aratani litigation was terminated. (App. 16 - 17).

Proceedings in the Abe case were postponed pending the outcome of the companion case of Aratani v. Kennedy, relating to the allowed yen deposit claims of the Sumitomo Bank depositors. In the latter case the District Court granted the Government's motion for summary judgment and dismissed the complaint for review. On appeal, this Court affirmed the District Court and upheld the Custodian's allowance of the claims at the postwar rate. Aratani v. Kennedy, 115 U.S. App. D.C. 97, 317 F.2d 161 (1963).[2/] A subsequent motion for

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2/ This Court did not, as appellants assert (Br., pp. 2, 13) find that the yen certificates of deposit were not yen obligations payable in Japan but were dollar obligations payable in the United States. This Court found (115 U.S. App. D.C. 97, 317 F.2d 161, at 166), that with respect to Sumitomo Bank, Ltd., the yen receipts issued by Sumitomo, were also redeemable in dollars at Sumitomo's American branches, as well as in yen in Japan. The purchase of yen certificates or receipts was characterized by this Court as "foreign exchange transactions" (at 317 F.2d 170).

amendment and modification of the judgment was denied. 115 U.S. App. D.C. 106, 323 F.2d 427 (1963).

On October 21, 1963, the Supreme Court granted certiorari. 373 U.S. 877. Thereafter, the parties entered into a compromise settlement of the allowed Yokohama Specie Bank, Ltd., and Sumitomo Bank, Ltd., yen deposit claims and the Supreme Court referred the case to the District Court for the approval of the compromise settlement. 376 U.S. 936. Judge Leonard P. Walsh approved the settlement on May 18, 1964, 228 F. Supp. 706, and the writ of certiorari was dismissed, 380 U.S. 938 (1965).

Under the above settlement the Abe claimants and their counsel were to be paid from YSB assets the total sum of $5,181,549.12 including principal and interest from which 20%, or approximately $1,036,300, was deducted and paid in attorneys' fees.[3/]

The Honda claimants were not included in that compromise settlement, since they were not listed in the final schedule,

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3/ The settlement is succinctly set forth in Aratani v. Kennedy and three other cases, 228 F. Supp. 706, at 707-708 (1964). At the prewar rate of exchange of 23.4 cents per yen, Sumitomo claimants would receive $4,909,307.42 and the YSB claimants would receive $10,524,487.99. Under the settlement, Sumitomo claimants received all the assets held by the Custodian, $1,213,808.44, or about 25% of their maximum claim; YSB claimants received $5,181,549.12, or about 49% of their maximum claim. From each of these settlement sums, counsel were allowed 20% for fees, or a total of $1,279,071.51.

had not filed complaints for review under Section 34 of the Trading with the Enemy Act (50 U.S.C. App. 34) and were not parties to the litigation. (App. 17). Indeed, the Honda claimants had not then established that they were creditors or eligible to receive any payment in any amount.

It has been estimated that after payment under Abe and Aratani, approximately $10.5 million dollars remained in the account of the Yokohama Specie Bank, Ltd., in the Office of Alien Property.[4/] Pursuant to Section 39 of the Act, 50 U.S.C. App. 39, enacted on August 7, 1953, any remaining proceeds in that account will be transferred to the War Claims Fund in the United States Treasury for administration by the Foreign Claims Settlement Commission in paying various claims of United States citizens arising principally out of German and Japanese military operations in World War II.

Shortly after announcement of approval of the settlement reached with the above class of allowed claimants, several thousand YSB yen certificate holders who had not been listed among the allowed claimants on the final schedule, and who had not filed complaints for review under Section 34 of the Act

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4/ The Sumitomo Bank's assets in the hands of the Custodian were exhausted under the settlement.

(50 U.S.C. App. 34), filed suit in Honda v. Kennedy, on May 18, 1964, C.A. No. 2529-61, D.C. D. C., seeking similar treatment. (App. 14-19). Their claims had been denied administratively in toto because they had not submitted their yen certificates of deposit or established eligibility for payment, in contrast to the Abe and Aratani claimants. Like the latter claimants, however, they had been advised that aggrieved claimants could seek review in the District Court of adverse administrative action, and they had been served with the final schedule of allowed claims, from which their names were omitted since their claims had been dismissed. (App. 24-25).

Attorneys Rauh and Silard, on behalf of the Honda class, requested that the dismissed claims be recognized at the same conversion rate as that under which plaintiffs in Abe were paid as a result of the compromise settlement. (App. 18-19).

On March 31, 1965, the District Court entered orders granting the government's motion to dismiss this complaint for review, on the ground that the court lacked jurisdiction of the subject matter since the complaints were not filed within the sixty-day limitation period prescribed by Section 34(f) of the Trading with the Enemy Act. (App. 25). The Court of Appeals affirmed. Honda v. Katzenbach, 123 U.S. App. D.C. 12, 356 F.2d

351 (1966). The Supreme Court granted certiorari. Honda v. Katzenbach, 385 U.S. 917 (1966).

The Supreme Court held, Honda v. Clark, 386 U.S. 484 (1967), that the legislative history of Section 34 of the Trading with the Enemy Act showed a Congressional intent to attain a fairer distribution of assets among nonemeny creditors and approached its objective along the lines of the Bankruptcy Act. The Bankruptcy Act permits creditors who have not filed timely claims, later to file after all properly filed claims have been allowed and paid, and, if allowed, to be paid out of any surplus. By analogy, debt claimants who had timely filed claims but untimely petitioned for review under Section 34, should equitably be able to claim against any surplus. Accordingly, the Supreme Court invoked the equitable doctrine of tolling, as best serving the statutory purpose, and ruled that the 60-day limitation to file for review under Section 34 was tolled during the pendency of the Abe litigation (at p. 500).

The Supreme Court noted however, that the Honda group of claimants were not in the same class of claimants as the Abe group (p. 494) and that their untimely complaint for review, though cognizable, placed the Honda claimants in a subordinate position to those who had been timely. For, only after timely claimants had been paid in full, could Honda

claimants be paid,and then only to the extent that the surplus assets permitted (p. 496).

After the Supreme Court's decision, the case was remanded to the District Court. Thereafter, on June 6, 1967, petitioners Carolan and Amram, for the first time, entered their appearance on behalf of more than 700 members of the Honda class from whom Carolan held retainers (R. Item 16), but on whose behalf petitioner Carolan did not complete the administrative process and for whom Carolan and Amram did not file timely petitions for review as they had for their other clients in the Abe group. (App. 14-17, 25, 110). On June 30, 1968, Carolan and Amram filed a "petition for award of counsel fees." (App. 44-47, 50-54). As attorneys for the yen certificate holders in the Abe case, Carolan and Amram had been awarded a fee of 20% of the amount paid to the Abe certificate holders, which they shared agreeably with other counsel. Despite the fact that they were not counsel of record in the Honda case, Carolan and Amram now claim entitlement to counsel fees in this case also because, they argue, that they, as counsel for Abe, had, in that litigation, tolled the statute of limitations for the benefit of the Honda plaintiffs. (App. 45-46, 51-52). In addition, Carolan claimed that in his representation of yen certificate holders, including some 700 Honda-type claimants at the administrative level,

he had benefited all yen claimants and was entitled to counsel fees in this case for those administrative services. (App. 45, 51, 53).

On October 25, 1967, the District Court rendered an opinion in which it rejected the theory that Carolan and Amram were entitled to further counsel fees predicated upon their services rendered in the Abe litigation. (App. 58-65). However, the District Court ruled that Carolan and other attorneys who may have represented yen certificate claimants at the administrative level, benefited the Honda group and were entitled to compensation for such services. (App. 66-68).

The District Court reaffirmed its views on counsel fees in a subsequent opinion dated April 30, 1968, denying additional counsel fees for services rendered in the Abe litigation, and overruling the Government's objections to the allowance of counsel fees for services allegedly performed at the administrative level. (App. 90-95). The Court, in its opinion and order, each dated April 30, 1968 (App. 90, 93), did clarify some ambiguities contained in its earlier opinion of October 25, 1967. (App. 58, 68). The Court directed: (a) that defendant will ascertain from department records all counsel who participated at the administrative level and notify them of the ruling of the court; (b) that all counsel desiring to assert a claim for services at the administrative stage shall file a petition therefor with the Clerk; (c) that

the total amount to be paid on said claims shall not exceed 5% of the total paid to Honda class claimants who have not heretofore engaged or contracted for attorneys' services; (d) that attorneys under retainer to Honda class claimants are not necessarily excluded from claiming fees for administrative stage services in addition to those payable under their retainer contracts; and (e) any counsel fees paid under this order will be paid only out of funds remaining in YSB vested assets after all Honda class claims are paid and after counsel fees to their attorneys in this litigation are paid.[5/] (App. 93-94).

In compliance with the Provisional Consent Judgment and decree of July 6, 1967, which was made final on April 30, 1968, the Attorney General has undertaken and is currently engaged in the administrative processes of examining the proofs of indebtedness submitted to the Custodian between July 6, 1967 and October 1, 1968, for the first time, and determining

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the eligibility of each claimant under the provisions of the Trading with the Enemy Act, a determination that has never before been made because the claims had been dismissed as abandoned. (App. 23, 70-73). Not until these administrative functions have been completed (and reviewed, if necessary, by the District Court in the pending Section 34 proceeding), will the amount payable to Honda class claimants be known. It is speculative, therefore, to state, as petitioners do, that Honda class counsel, Rauh and Silard, have been awarded a fee of less than 10% or that "5% of $10,500,000" has any significance whatever.[6/] The fees awarded to Rauh and Silard may be less than 10% or may be more than 20% or they may be (very likely) about 15%. Until it is administratively determined which of the Honda class claims are allowable and payable, there can be no basis under Section 20 of the Trading with the Enemy Act to deal with specific figures or speak in terms of percentages of such figures.

On May 27, 1968, Carolan and Amram filed a notice of appeal from the District Court's order of April 30, 1968 (App. 121). The government filed notice of cross-appeal on June 28, 1968, from only that part of the order of April 30, 1968 that awarded counsel fees for services performed at the administrative level. (App. 122).

6/ Appellant's brief, pp.19, 24.

the total amount to be paid on said claims shall not exceed 5% of the total paid to Honda class claimants who have not heretofore engaged or contracted for attorneys' services; (d) that attorneys under retainer to Honda class claimants are not necessarily excluded from claiming fees for administrative stage services in addition to those payable under their retainer contracts; and (e) any counsel fees paid under this order will be paid only out of funds remaining in YSB vested assets after all Honda class claims are paid and after counsel fees to their attorneys in this litigation are paid.[5/] (App. 93-94).

In compliance with the Provisional Consent Judgment and decree of July 6, 1967, which was made final on April 30, 1968, the Attorney General has undertaken and is currently engaged in the administrative processes of examining the proofs of indebtedness submitted to the Custodian between July 6, 1967 and October 1, 1968, for the first time, and determining

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6/ Appellant's brief, pp.19, 24 .

STATUTE INVOLVED

Section 20 of the Trading with the Enemy Act, 50 U.S.C. App. §20, is set forth in full in Appendix A to this brief.

SUMMARY OF ARGUMENT

1. Petitioners are not entitled to an award of counsel fees from the Honda plaintiffs, on the basis of legal services rendered in the Abe-Aratani litigation, to which these plaintiffs were not parties, because the plaintiffs derived no benefit from that litigation and do not share a homogeneity of interest with the Abe claimants.

Plaintiffs derived no benefit from the successful termination of the Abe litigation through a judicially approved compromise because as a consequence of the order entered in that case, no Honda-type claimant became entitled to payment of any money whatever. The Abe claimants were those whose debt claims against YSB had been allowed and found payable by the Custodian and who filed a timely complaint for review of the final schedule on which they were listed. The Honda claimants were those whose debt claims against YSB were dismissed and disallowed and who filed no claim for review within the time prescribed by Section 34(f) of the Trading with the Enemy Act (50 U.S.C. App. 34(f)) and whose names were not listed on the final schedule of allowed and payable claims.

Abe and Honda claimants are in different classes.

The Abe litigation involved but one limited issue: the proper rate of exchange for redemption of the YSB yen certificates of deposit. That is, whether the "judgment day" rule (low postwar rate) or the "breach day" rule (higher prewar rate) was properly applicable. The compromise of this issue did not enable any Honda claimant to receive payment of the compromise rate. It was first necessary for them to institute a new suit to establish that their dismissed debt claims were still cognizable notwithstanding their failure to prove their debts or timely to file a complaint for review. Petitioners did not bring that suit. The Supreme Court found that the statutory scheme of Section 34 of the Trading with the Enemy Act was best served by invoking the equitable doctrine of tolling the time to seek review, during the pendency of the Abe litigation.

Petitioners' reliance on the court's holding on tolling in the Honda case as attributable to services rendered by them in the Abe case, for which compensation should be awarded is unsupportable. No limitation issue was involved in the Abe case and the court's ruling was bottomed on issues litigated by Honda's counsel, not on any issue presented in the Abe case. Cf. Whittier v. Emmett, 108 U.S. App. D.C. 191, 199, 281 F.2d 24, 32 (1960). Moreover, the tolling of the statute did not,

per se, entitle Honda plaintiffs to receive payment, it merely afforded them the opportunity to first prove their debts and establish their eligibility to receive payment — and on a subordinate basis to the Abe claimants. For, Honda claimants, who qualify, may receive payment only to the extent that surplus YSB assets are sufficient.

Petitioners' legal services in the Abe litigation created no fund from which Honda plaintiffs could be paid. The fund from which either class of claimant could be paid is the seized assets of YSB in the hands of the Custodian created by his seizure. Petitioners' services in Abe might be said to have carved out of those assets a fund of over $5,000,000 — which paid all the Abe claims and their attorneys' fees, fixed at 20%. Honda's own attorneys in the current litigation may be said to have carved out of remaining YSB assets, otherwise statutorily committed to the War Claims Fund, a new and different fund in as yet an undetermined amount. The resolution of the limited issue in Abe did not establish a fund for Honda. At best, Abe decided the properly applicable principle of law — viz., "judgment day" or "breach day" rule. But successful litigation leading to the announcement of a rule of law does not thereby entitle counsel to compensation from all who later benefit from the application of the rule.

Whittier v. Emmet, 108 U.S. App. D.C. 191, 199, 281 F.2d 24, 32 (1960). Upon entry of judgment in the Abe case, Honda claimants did not become entitled to any payment on their claims whatever by stare decisis or otherwise. The necessary homogeneity of interest between the Abe and Honda claimants are lacking and petitioners' legal services did not supply it. Abbott, Puller & Meyers v. Peyser, 75 U.S. App. D.C. 162, 164, 124 F.2d 524, 526 (1941).

2. Neither Petitioners nor any attorneys are entitled to receive additional compensation for services rendered to the Honda claimants during the prelitigation administrative stages of proceedings before the Custodian, which were concluded not later than May 1961, upon issuance of the final schedule listing the allowed and payable claims. No Honda claimant was listed on that schedule. Every Honda plaintiff's claim had been dismissed and been disallowed before issuance of the schedule. None were entitled to payment even at the low postwar rate of exchange allowed by the Custodian. No attorney, not even petitioner Carolan who represented more than 700 Honda-type claimants, had proved the debt or had had determined the eligibility for payment of any Honda claimant. Success is a prerequisite to a claim for additional compensation as between "solicitor and client." Thomas v. Peyser, 73 U.S. 155, 157, 118 F.2d 369, 371 (1941).

The award of additional compensation by Judge Walsh in the Abe litigation, in part for administrative-level services, under Section 20 of the Trading with the Enemy Act, can not be a predicate for a similar award in this case. The court below erroneously considered it dispositive.

The Abe claimants, with whom Judge Walsh was concerned, were successful at the conclusion of the administrative proceedings, at least to the extent of having their claims found to be allowed and payable. They completed the administrative process, the Honda claimants did not. Whatever may have been the services of Petitioner Carolan and his associates during administrative proceedings and even though Honda claimants were potentially vitally involved with them, the fact remained that Honda claimants, were, at the conclusion of those proceedings, entitled to nothing — their claims were dismissed. Additional compensation should not be awarded for services that resulted in such complete failure.

Section 20 of the Trading with the Enemy Act limits the amount of fees that may be paid upon payment of a debt claim. It authorizes additional compensation only where the court finds that "there exists special circumstances of unusual hardship." Surely legal services at the administrative level which, for the Honda plaintiffs, culminated in the dismissal and disallowance of their claims, not only fails to meet the

element of payment but cannot support a finding of "unusual hardship." Even if additional compensation is sought under the equity powers of the court, the allowance would only be appropriate in exceptional cases and for dominating reasons of justice. Sprague v. Ticonic Bank, 307 U.S. 161, 167 (1939). These criteria are not met by unsuccessful services.

Counsel for the Honda claimants, including Petitioner Carolan, are amply compensated under their retainer agreements for administrative services and are not entitled to additional compensation.

ARGUMENT

I. PETITIONERS ARE NOT ENTITLED TO COMPENSATION FROM THE HONDA PLAINTIFFS BY REASON OF THEIR SERVICES IN THE ABE-ARATANI LITIGATION.

The exercise of the court's equity powers to allow counsel fees from beneficiaries who were not parties to the litigation in which the services were rendered is "appropriate only in exceptional cases and for dominating reasons of justice." Sprague v. Ticonic Bank, 307 U.S. 161, 167 (1939).

At attorney is not entitled to compensation from a person or class of persons who are not his clients on the basis of a "solicitor and client" relationship, unless, at the very least, his services to another or to others have benefited those he later seeks to charge.

Thomas v. Peyser, 73 U.S. App. D.C. 155, 157, 118 F.2d 369, 371 (1941). There must also be a homogeneity of interest between a person or class of persons whom the attorney did represent and those from whom he seeks compensation. Abbott, Puller & Meyers v. Peyser, 75 U.S. App. D.C. 162, 164, 124 F.2d 524, 526 (1941).

The Honda plaintiffs derived no benefit from the services rendered by the petitioners in the Abe-Aratani litigation. There is no homogeneity of interest between the Abe claimants, whom the petitioners did represent, and the Honda plaintiffs, whom they did not represent.

A. Honda plaintiffs did not benefit from services rendered to Abe claimants in the Abe-Aratani litigation.

As the Supreme Court observed, the Abe claimants and the Honda claimants were not of the same class. Honda v. Clark, 386 U.S. 484, 494 (1967). The Abe claimants were holders of YSB yen certificates of deposit, who had perfected their claims before the Custodian, had their eligibility to receive payment determined under the Trading with the Enemy Act (50 U.S.C. App. §1, et seq.), and were listed in a final schedule, filed in accordance with law, as claimants whose debt claims against YSB were allowed and were payable at 361.55 yen to the dollar. They

are the claimants who filed a complaint for review in the District Court challenging the rate of payment under Section 34 of the Trading with the Enemy Act (50 U.S.C. App. §34).

On the other hand, the Honda claimants had not proved or perfected their debt claims, had not had their eligibility for payment determined by the Custodian, had had their claims dismissed as abandoned, and were not listed on the final schedule as claimants whose claims were allowed and were payable under the Trading with the Enemy Act. They had not filed any complaint for review under Section 34 of the Trading with the Enemy Act, although each had been served with a copy of the final schedule and had been apprised of his right to petition for such review. At this stage, the conclusion of the administrative proceedings, the Honda claimants were not even entitled to a payment of 361.55 yen to the dollar.

The Abe-Aratani litigation established, by compromise not judicially, that their claims, for both principal and interest, would be paid at a compromise figure of approximately 32.5 cents per yen of which, after the deduction of counsel fees to the petitioners and their associates, each Abe claimant would receive 25.133 cents per yen. This compromise was approved by the District Court and amounted to 49% of their maximum claims for principal and interest. This compromise, and its approval by the court, did not entitle any claimant, who had not proved both his debt and his eligibility for

payment, and who was not listed on the final schedule, to receive anything on his claim either at the rate allowed by the Custodian or at the rate agreed upon by the parties in the litigation. The Abe-Aratani litigation involved the sole issue of the proper rate of exchange. That litigation did not establish or purport to establish that any claimant in the class that has now become the Honda group, was the owner of a YSB yen certificate of deposit or if he was, the amount thereof, or that he was eligible to receive payment. Nor did the Abe-Aratani litigation determine that Honda-type YSB yen certificate of deposit claimants whose timely filed claims had been dismissed by the Custodian as abandoned, were not barred from seeking any relief even as to payment of 361.55 yen to the dollar, by reason of their failure timely to file a complaint for review of the Custodian's adverse action against them.

The right to any relief whatever of any YSB yen certificate of deposit claimant who was not listed on the final schedule and who had not proved his claim and had his eligibility determined, required a new lawsuit presenting entirely new issues. This suit was brought on behalf of such claimants by attorneys other than the petitioners, notwithstanding that one of the petitioners represented over 700 such claimants. This suit, brought by Honda on behalf of himself and others similarly situated, sought to establish that the

failure of these claimants to prove their claims or their eligibility for payment should not bar them from recovering on a debt claim under the Trading with the Enemy Act on the ground, essentially, that because they were allegedly misled and confused by the Custodian's letter advising them of his decision to pay only 361.55 yen to the dollar and therefore did nothing about proving their claims, the Custodian should be estopped from asserting the untimeliness of the filing of their complaints for review. The Honda claimants also contended that a denial to them of payment of their debt claims would violate the due process clause of the Fifth Amendment to the Constitution. Both the district court and this court upheld the dismissal of the Honda complaint on the ground asserted by the defendant that the court lacked jurisdiction of the subject matter since the complaints were not timely filed in accordance with Section 34(f) of the Trading with the Enemy Act.

The Supreme Court reversed the dismissal of the Honda complaints not on the grounds urged by the Honda plaintiffs, that is, estoppel and violation of due process, but upon a holding that the statutory scheme of Section 34 of the Trading with the Enemy Act was patterned after the Bankruptcy Act and would best be served by invoking the equitable principle of tolling during the pendency of the Abe litigation.

Petitioners contend that the reliance by the Supreme Court upon the Abe litigation as a tolling factor preserved the claims of the Honda class and therefore the services rendered by petitioners in the Abe litigation benefited the Honda claimants and entitled petitioners to compensation from the Honda group.

This contention loses sight of two significant points:

(1) the Abe litigation did not involve as an issue any limitation question to which tolling would be applicable and petitioners rendered no services to produce such a holding. The Supreme Court's utilization of the mere pendency of that case was bottomed on the services rendered by other counsel in the Honda case, and not on any services consciously or incidentally performed by petitioners in the Abe case. The Supreme Court applied the principle of tolling by interpreting the statute in the light of its legislative history not by reason of anything done by petitioners in the earlier litigation. This is not unlike the situation which confronted this Court in Whittier v. Emmett, 108 U.S. App. D.C. 191, 281 F.2d 24 (1960). In that case counsel sought and were denied fees for establishing, through litigation, that veterans were entitled to refunds for insurance premiums collected from them under an erroneous interpretation of law. Immediately following the judicial decision to that effect, Congress enacted legislation to appropriate monies for such

refunds and barred technical defenses, such as the statute of limitations, to claims for refunds. This court held that counsel created no distinct fund, had only benefited a few veterans, not those subject to technical defenses. Summarily rejected by this court was the claim to fees based on the contention that Congress would not have passed legislation and established a fund but for the successful litigation as was also a claim for compensation based on services rendered in sponsoring the favorable legislation. See 108 U.S. App. D.C. at 199, 281 F.2d at 32;

(2) the entertainment of the Honda complaint for review, made possible by the tolling of the 60-day period, still did not entitle the Honda plaintiffs to any payment of any money on their yen certificate of deposit claims by reason of the compromise or the judicial approval thereof in the Abe litigation. The Honda plaintiffs were not thereby brought within the class which petitioners did represent, and did not thereby benefit from those services. Each of the Honda plaintiffs was required by the Trading with the Enemy Act, as recognized by the Consent Judgment and Decree of the district court, to establish that he was the owner of a yen certificate of deposit, that he was not interned or paroled during the war, and that he was otherwise eligible to receive payment on his claim. These administrative proceedings, subject to the supervision of the district court, are now going

forward. All these processes were completed with respect to the group of Abe claimants prior to the filing of the Final Schedule, review of which they sought in 1961.

The petitioners contend that their services in the Abe-Aratani litigation established a fund for the benefit of the Honda plaintiffs and that the district court erred in holding that the petitioners did not create such a fund. The court below stated that the fund resulted from the proceeds of the assets of the Yokohama Specie Bank and that it was Congress, by enacting Section 34 of the Trading with the Enemy Act, giving to certain creditors the right to recover from such assets, that established and preserved those assets for all qualified creditors. This is an accurate description of the creation of the fund and its preservation. The court below is correct.

However, if we should assume that upon the establishment of entitlement of any particular claimant or any group of claimants to payment of their debts out of these assets, a fund pro tanto is thereby created by their attorneys out of those assets, this still avails the Petitioners nothing. Petitioners, under this assumption, created a fund of some $5 million dollars for the benefit of Abe claimants. It was this latter amount that was utilized out of the YSB assets to pay all Abe claimants and the fees of their attorneys. No

part of that fund was payable or could be paid to the Honda claimants. Petitioners created no fund whatsoever out of YSB assets for the benefit of Honda claimants.

Under the same assumption, counsel for the Honda plaintiffs in this suit, through their successful litigation, have carved out of the YSB assets a new and additional fund in an amount as yet undetermined, from which the Honda claimants may be paid. The Petitioners had no part in the creation of this new fund, although their earlier litigation may have, but not necessarily, determined the size of that fund. But the size of the fund was governed merely by the application of a legal principle at best, that is, whether the "judgment day" rule of Deutsche Bank v. Humphrey, 272 U.S. 517 (1926), or the "breach day" rule of Hicks v. Guinness, 269 U.S. 71 (1925), was the proper rule of law to be applied. However, one who is influential in litigation leading to the announcement of a rule of law, does not thereby gain a right to compensation from all those who later benefit from the application of the rule. Whittier v. Emmet, 108 U.S. App. D.C. 191, 199, 281 F. 2d 24, 32 (1960). Nor did the Abe-Aratani litigation create a stare decisis situation insofar as the Honda claimants are concerned. All that the judicially approved compromise in that litigation accomplished was the acceptance of a stipulated dollar conversion rate for the yen obligation.

None of the Honda plaintiffs were able, as a result of that compromise, to avail themselves of that rate or any other rate. The Honda claimants were, upon the entry of judgment by Judge Walsh in the Abe litigation, still entitled to nothing and were unable to come into court and, without more, claim its benefits. Indeed, even after the Supreme Court, in Honda's own litigation, declared that untimely claims were still cognizable under a proper interpretation of the Trading with the Enemy Act, the Honda claimants could not be certain, nor are they yet, that they will obtain the same conversion rate as did the Abe claimants. It is purely a matter of fortuitousness that the Honda claimants will, in all probability, fare as well as the Abe claimants, but certainly the decision of the Supreme Court did not place them on such an equal footing. The Honda-type claimants of the Sumitomo Bank are less fortunate, but their unfortunate situation emphasizes the complete lack of parity between the Honda-type claimants and the Abe-Aratani claimants and demonstrates the lack of benefit conferred on the Honda-type claimants by the petitioner's efforts. The Honda-type debt claimants against Sumitomo Bank enjoy no fruits of petitioners' victory in the Aratani litigation. The Aratani claimants alone exhausted those assets. Surely, petitioners cannot claim that the amount of assets found in the United States belonging to Sumitomo or to YSB which were seized, was in any

way attributable to their services.

In short, nothing accomplished by the petitioners in the Abe-Aratani litigation, where they were uniformly unsuccessful in the courts, or through their compromise, approved by the court, has entitled any of the Honda claimants to receive payment in any amount, as creditors of YSB. The Honda plaintiffs have derived no benefit from the Abe-Aratani litigation. All that can be said for the Abe-Aratani litigation, insofar as Honda-type claimants are concerned, is that the higher redemption value placed upon a YSB yen certificate of deposit made more attractive to each of them, the prospect of instituting litigation encompassing different issues and in which it first would be necessary successfully to establish entirely new rights and to begin a new administrative prosecution of their claims which they had abandoned some seven years earlier.

B. The Honda claimants and the Abe claimants do not enjoy the same legal rights and lack the necessary homogeneity to support petitioners' claim for additional compensation.

Each of the cases upon which petitioners rely, and indeed, all cases where counsel have been awarded fees from a fund created by their efforts for the benefit of persons they did not represent, have concerned beneficiaries or a

class who, by reason of the services performed by counsel not their own, were entitled, prima facie, to recover the fund or acquire an indisputable interest in or right to a sum of money.

In Trustees v. Greenough, 105 U.S. 527 (1882), a single bondholder succeeded in preventing waste of lands by trustees acting improperly and in having successor trustees appointed who gathered into their possession additional valuable lands. All other bondholders were benefited by that action, although they did nothing. The mere status of being a bondholder enabled each to enjoy the fruits of the successful bondholder's efforts. No bondholder was required to institute suit to establish anything more. There was an identical homogeneous class interest among the bondholders.

In Sprague v. Ticonic Bank, 307 U.S. 161 (1939), the petitioner delivered a sum of money to the defendant bank, part of which was to be deposited in a savings account and the remainder in another account, which the bank maintained, along with funds of others, as a trust fund for investment. These latter funds were secured by bonds set aside as required by law. When the bank became insolvent, the petitioner, by suit, succeeded in impressing upon the proceeds of the bonds, a lien for the trust depositors. The petitioners' services, in so impressing a lien, provided not only herself, but all others who had placed funds in the same trust account, secured by the

same bonds, a fund from which they could be paid. As the court said: "The petitioner, by establishing her claim necessarily established the claims of 14 other trusts pertaining to the same bonds." Again, the legal rights of all of the trust beneficiaries were identical and, without more, the successful action of the petitioner equally benefited all the others.

In Wallace v. Fiske, 80 F.2d 897 (8th Cir., 1935), one of 10 children who shared equally in the remainder of a trust, brought suit against the trustee, in which he was later joined by two other remaindermen, to have declared that certain stock dividends which were being treated as income, should properly be treated as principal. Most of the other remaindermen, who were made parties to the suit, actively opposed the complaint and joined the trustee in his defense. The court held in favor of the plaintiff, thus increasing the corpus of the estate substantially. After the death of the life tenant, each remainderman, in accordance with the trust terms, shared equally in the corpus. The successful suitor in the earlier case sought reimbursement of counsel fees and expenses from the corpus for the benefits conferred by his efforts upon all remaindermen. At first, the court denied the application upon a strict contractual attorney-client consideration. On rehearing, however, the court reversed itself, pointing out, among other things, that notwithstanding their opposition to

the original suit, the benefits received by the other remaindermen were direct, not incidental. The interests of all remaindermen in this case were identical. The establishment of the benefit by three of them necessarily benefited the other seven. Each enjoyed equal rights in the successful result obtained in the earlier litigation. They were, as the court said, in the same class.

In all cases cited in support of the award of counsel fees to be borne by persons not represented by counsel seeking fees, this homogeneity of interest existed. That homogeneity does not exist between the Abe claimants and the Honda claimants. As was shown above, the Honda claimants are not in the same class; they do not have the same rights; litigation was necessary to establish, by the resolution of issues not raised or litigated in the Abe-Aratani litigation, that each yet had a right to prove his debt and establish his right to payment. These issues and this right to payment or even the right to assert their claims were not established for the Honda claimants in the Abe-Aratani litigation.

To understand the lack of similarity between the Abe claimants and the Honda claimants we need look no farther than the decision of the Supreme Court. The Supreme Court did not rule that the Honda plaintiffs were entitled to the same treatment as had been received by the Abe claimants. On the contrary, the court recognized that the Honda plaintiffs had been

less diligent than the Abe claimants and had delayed assertion of their entitlement to any recovery. The court therefore held that the Honda claimants could not be paid until after all the Abe claimants who had filed timely petitions for review were paid in full. Only then could the Honda claimants come in and receive payment on their debts and only to the extent that the surplus would permit. Honda v. Clark, supra, at p. 496. The Honda claimants are thus subordinate, both in rights and in entitlement to payment, to the Abe claimants.

Indeed, the only common ground between the Abe claimants and the Honda claimants is that each holds a yen certificate of deposit of YSB. As such certificate holders they do not, however, enjoy the same legal rights and the Abe litigation did not alter that differentiation or otherwise benefit the Honda plaintiffs any more than it benefited a certificate holder who had been interned.

II. NO ATTORNEY, INCLUDING PETITIONER CAROLAN, IS ENTITLED TO FURTHER COMPENSATION FOR PRELITIGATION SERVICES RENDERED DURING THE ADMINISTRATIVE STAGE.

Prior to the filing of a complaint for review in Aratani v. Kennedy, Civil Action 3164-58 (App. 99), the services rendered in administrative proceedings before the Custodian for any of the Honda plaintiffs was virtually nil. The consolidated hearing before a hearing examiner in the

Office of Alien Property was concerned with but one issue — the time when and the rate at which yen were to be translated into dollars. This limited issue in the administrative proceedings was one in which all claimants against Yokohama Specie Bank and of Sumitomo Bank who were holders of yen certificates of deposit, were equally concerned and equally involved.[7/] The Petitioner Carolan and his associates who conducted that proceeding, were unsuccessful in the result obtained. The Custodian, in a formal decision, applied the "judgment day" rule under the doctrine of Deutsche Bank v. Humphrey, 272 U.S. 517 (1926), and decided to pay holders of yen certificates of deposit 361.55 yen to the dollar, with contractual interest to the date of payment at the same rate. Petitioner Carolan had contended for the "breach day" rule as enunciated in Hicks v. Guinness, 269 U.S. 71 (1925), under which holders of yen certificates of deposit would receive the much higher prewar rate of 23.4 cents per yen, with

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7/ The resolution of this question was, of course, not dispositive of the claims. Other questions, such as eligibility to receive payment and ownership of the debt, were yet to be determined administratively. The Hearing Examiner so noted in his recommended decision.

contractual interest at the same rate until the date of payment. The decision of the Custodian was clearly adverse to the claimants.

It is axiomatic that an award of counsel fees as between "solicitor and client" cannot be predicated upon unsuccessful services which did not benefit the person or class sought to be charged and whom counsel did not represent. Thomas v. Peyser, 73 U.S. App. D.C. 155, 157, 118 F.2d 369, 371 (1941). No Honda plaintiff's debt claim was allowed upon the conclusion of the administrative proceeding and none therefore benefited from the services of any attorney during that stage.

After the Custodian's decision it became necessary to complete the administrative process with respect to all debt claimants who were holders of yen certificates of deposit. The Abe group of debt claimants furnished their certificates as requested, established their ownership, satisfied the Custodian that they had not been interned or paroled under the Alien Enemy Act (50 U.S.C. 21) and were eligible under Section 34 of the Trading with the Enemy Act to receive payment (App. 112). This was not done by or for any of the Honda claimants. (App. 16, 23-24). Petitioner Carolan, although then holding retainers for over 700 claimants who are now part of the Honda group, did not submit on their behalf the proofs of indebtedness in the forms of original certificates or proofs of their

loss, nor did he obtain a determination that any of those claimants were eligible to receive payment. None of the other Honda claimants, or their attorneys on their behalf, completed the administrative process. Each of the Honda-type claimants was advised that his claim was dismissed as abandoned. (App. 23-24). None of them did anything. Petitioner Carolan did nothing. Other attorneys did nothing. All the administrative proceedings necessary to entitle the Honda plaintiffs to receive payment, on any basis, are now for the first time being conducted and were initiated (as a result of the Supreme Court's decision in Honda v. Clark, 386 U.S. 484 (1967)), after the entry of the Provisional Consent Judgment and Decree on July 6, 1967.

The court below, although finding that the petitioners were entitled to no compensation by reason of their services rendered in the Abe-Aratani litigation did conclude that counsel, including Petitioner Carolan, had rendered services at the administrative stage which were beneficial to the Honda plaintiffs. In part, perhaps decisively, the court below relied upon an alleged concession made by the Government before the Supreme Court and alluded to in the joint motion for the entry of a consent judgment and upon a statement by counsel for

the Honda plaintiffs, which led it to believe that each of the Honda plaintiffs had already proved their debts and had been determined to be eligible for payment.[8/] This is simply not the fact.[9/] The Consent Judgment and Decree recognizes, in paragraph 3, thereof, that debts of Honda claimants must yet be proved as must be the eligibility of each claimant. Thus, the assumption by the court below that petitioner Carolan and other counsel had administratively obtained on behalf of the Honda claimants, as they had for Abe claimants, a determination of their statutory eligibility to receive payment, but for the untimeliness in the filing of a suit under Section 34 of the Trading with the Enemy Act, is not

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8/ See District Court's memorandum of October 25, 1967. (App. 66).

9/ There is no statement in the Government's brief in the Supreme Court (Honda v. Clark, Oct. Term 1966, No. 164) that can be interpreted as a concession that the Honda claims were valid and payable. The brief does state on page 6, "After the war, those certificates of deposit were recognized as valid and collectible at face value in yen [in Japan]." The statement in the joint motion to the contrary, seized upon by petitioners, reflects carelessness on the part of Government counsel, but does not alter the truth, which is contrary to it.

valid. In any event, as will be shown later, such administrative services, as may have been performed, are fully covered by the provisions of Section 20 of the Trading with the Enemy Act and would be fairly compensated under the terms of the retainer agreements between counsel and their clients for whom those routine services were performed.

However, the court below, in awarding counsel fees for services rendered during the administrative proceedings, also relies, perhaps conclusively, on the prior action of Judge Walsh who, in approving counsel fees under Section 20 of the Trading with the Enemy Act in the amount of 20%, included services rendered at the administrative level. Judge Walsh, of course, was dealing with the Abe-Aratani class of claimants. These claimants,as has been pointed out, did complete the administrative process and their attorneys did perform services for each of their clients at that stage of the proceedings in proving the debts and in establishing eligibility. No such services were rendered for the Honda plaintiffs. In its later opinion of April 30, 1968, the court below, in reaffirming its award of counsel fees for services rendered in the administrative proceedings, reinforced its view that such services should be compensated by pointing to the statement of services submitted by Petitioner Carolan. In that statement Petitioner Carolan sets forth that he obtained from the Custodian an extension of the bar date for the filing of claims

and successfully opposed legislation which would have banned from the scope of Section 34 as debt claims, all obligations expressed in a foreign currency.

Even if Petitioner Carolan be credited with solely having obtained the extension of a bar date from the Custodian and the defeat of legislation in the Congress,[10/] Petitioner Carolan did not utilize those services even for his own 700 Honda-type claimants. Nor did it benefit any of the Honda-type claimants for, at the conclusion of the administrative proceedings in May 1961, the claims of the Honda claimants stood dismissed and none of them became entitled to any payment. Only by reason of the suit instituted here on behalf of Honda and others similarly situated by counsel other than the petitioners, have the Honda claimants become entitled to receive anything. Those administrative services were, of course, of benefit to the Abe claimants. For that Petitioner Carolan and other attorneys have been paid.

10/ See, e.g. Hearing before a Senate Subcommittee of the Committee on the Judiciary, 84th Cong., 1st Session, on S.1147, September 29, 1955. Three persons including Mr. Carolan testified and four persons submitted statements — all in opposition. Only the Department of Justice favored enactment.

Section 20 of the Trading with the Enemy Act provides the statutory guide and limitation on the payment of counsel fees. Under its provisions, attorneys are entitled to charge their clients for services rendered in connection with the return or payment of property seized under that Act, a sum not in excess of 10% of the value of such property or interest. Only if upon application to a court, the court is satisfied and finds that "there exists special circumstances of unusual hardship which require the payment" of a sum in excess of 10% of the value of such property may a greater award be made. It was this section of the law with which Judge Walsh was concerned when he awarded to the Petitioners and some 30 other attorneys aggregate fees of 20% of the amount paid to the Abe-Aratani claimants. But Section 20 only becomes operative in case of payment or award of judgment to the claimant. Honda claimants received no payments as a result of services rendered by Carolan or any attorney at the conclusion of the administrative proceedings and they received no benefit from those services. Such lack of success not only failed to meet the requirement of payment, it certainly cannot form a base for finding "unusual hardship" to support an award of additional compensation.

It is submitted that so few successful services were rendered to the Honda plaintiffs during the administrative proceedings, even including the extension of a bar date and the

defeat of legislation which would ban all foreign currency debt claims from the purview of Section 34 of the Trading with the Enemy Act,[11/] that counsel will be sufficiently compensated by payment to them of their fees under their retainer agreements.

Section 20 of the Training with the Enemy Act would appear to be the exclusive vehicle for the award of additional counsel fees. But if the court below awarded additional counsel fees for services rendered during the administrative stages, based on its equity powers, such award is still inappropriate. The equity powers of the court to award counsel fees is appropriate only in exceptional cases and for dominating reasons of justice. Sprague v. Ticonic Bank, 307 U.S. 161, 167 (1939). The criteria for such allowance

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11/ The legislation that was proposed and not enacted was addressed to the exclusion, from Section 34, of debt claims payable in foreign currencies and was not merely directed against yen claims or yen certificate of deposit claims. The legislation would have equally embraced German currency claims or any other foreign currency. If Petitioner Carolan's opposition to the enactment of this legislation is considered sufficiently beneficial to the Honda claimants, because of their yen debt claims, so as to justify an award of counsel fees from that group, may not Petitioner Carolan recover a fee from every other debt claimant who has received an award, expressed in terms of German currency, for example?

are not unlike those required by Section 20. Administrative-level services which resulted in the dismissal of Honda plaintiffs' claims surely do not present an exceptional case or a situation in which dominating reasons of justice call for an award of additional counsel fees for such failure.

It is further submitted that the decretal portion of the District Court's order under which the fund of 5% of those claims whose claimants have not heretofore retained counsel, together with the requirement that the Government ascertain from its records which attorneys performed services during the administrative stages, imposes an onerous, burdensome task on the Government. The order also contemplates that the division of this fund among the claiming counsel may require the services of a special master who, in turn, must also be paid. This burden is too great for the negligible and unsuccessful administrative stage services performed by any attorney for any of the claimants in the Honda group — services which would be amply compensated through their individual retainer agreements.

CONCLUSION

The judgment and decree of the court below should be affirmed insofar as it denies to petitioners an award of counsel fees for services rendered in the Abe-Aratani

litigation. The judgment and decree of the court below should be reversed insofar as it awards any additional counsel fees to the petitioners or to any attorneys for services allegedly rendered during the prelitigation administrative stages of the Honda claims.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General

IRVING JAFFE,

ALAN S. ROSENTHAL,

JOHN R. FRANKLIN,
Attorneys, Department of Justice,
Washington, D. C. 20530.

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APPENDIX A

Section 20, Trading with the Enemy Act (50 U.S.C. App. Sec. 20):

> Sec. 20. No property or interest or proceeds shall be returned under this Act, nor shall any payment be made or judgment awarded in respect of any property or interest vested in or transferred to any officer or agency of the United States under this Act unless satisfactory evidence is furnished to the President or such officer or agency as he may designate, or the court, as the case may be, that the aggregate of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services rendered in connection with such return or payment or judgment does not exceed 10 per centum of the value of such property or interest or proceeds or of such payment. Any agent, attorney at law or in fact, or representative, believing that the aggregate of the fees should be in excess of such 10 per centum may, in the case of any return of, or the making of any payment in respect of, such property or interest or proceeds by the President or such officer or agency as he may designate, petition the district court of the United States for the district in which he resides for an order authorizing fees in excess of 10 per centum and shall name such officer or agency as respondent. The court hearing such petition, or a court awarding any judgment in respect of any such property or interest or proceeds, as the case may be, shall approve an aggregate of fees in excess of 10 per centum of the value of such property or interest or proceeds only upon a finding that there exist special circumstances of unusual hardship which require the payment of such excess. Any person accepting any fee in excess of an amount approved hereunder, or retaining for more than thirty days any portion of a fee, accepted prior to approval hereunder, in excess of the fee as approved, shall be guilty of a violation of this Act.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,188

AYAKO HONDA, *et al.*
THOMAS H. CAROLAN and PHILIP W. AMRAM,
Appellants

v.

JOHN N. MITCHELL,
Attorney General of the United States

No. 22,193

AYAKO HONDA, *et al.*

JOHN N. MITCHELL,
Attorney General of the United States,
Appellant.

REPLY BRIEF OF APPELLANTS

Bardyl R. Tirana, Esq.
Amram, Hahn & Sundlun
700 Colorado Building
Washington, D. C. 20005
Attorney for Appellants

THOMAS H. CAROLAN, ESQ.
and
PHILIP W. AMRAM, ESQ.
Appellants pro se

Washington, D. C. THIEL PRESS 202 393 0625

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REPLY BRIEF OF APPELLANTS

Our main brief treats almost all the points made by the Government in its brief and answers the Government's contentions in advance. Therefore, only a few matters warrant a brief reply.

* * *

1. The Government's brief clearly focuses the simple issue in this case.

When all the massive detail is distilled to its essence, the Government recognizes, both in its statement of the facts and in its argument, that the ultimate multimillion dollar recovery by the *Honda* claimants rests on a tripod foundation.

> (a) Carolan's services from 1947 to 1958 to the *Honda* claimants in the administrative proceedings.
>
> (b) Carolan and Amram's services from 1958 to 1964 in the litigation of the *Abe-Aratani* cases.
>
> (c) Rauh and Silard's services from 1964 to 1967 in the subsequent *Honda* litigation commenced after *Abe-Aratani* was over.

The Government does not contend and could not contend that the entire tripod is not needed, that one or more of the legs of the tripod can be removed without effect on the *Honda* recovery, or that the *Honda* claimants could have recovered solely on the foundation of leg (c) of the tripod without the support of legs (a) and (b).

As to leg (a), if Carolan had not secured extensions of time to file claims, had not defeated the Government's legislative efforts, had not represented the *Honda* claimants in the eleven years of administrative proceedings from 1947 to 1958, and had not conducted the lengthy hearings before George W. Carr, the Hearing Examiner, in which the *Honda* claimants were "equally concerned" and "vitally involved" (Govt. Brief pp. 20, 36), all the *Honda* claims would have been extinct twenty years ago.

As to leg (b), if Carolan and Amram had not prosecuted the *Abe* litation for the six years from 1958 to 1964 (*while the Honda claimants voluntarily and deliberately sat on the sidelines*

awaiting a favorable result) in which litigation Carolan and Amram represented the *Honda* claimaints in every "material respect" (386 U.S. at p. 499), the *Honda* claimants would never have had an "opportunity" to make their claims in 1964 (Govt. Brief p. 18) and the Supreme Court could have found no basis to invoke the "equitable doctrine of tolling" the statute of limitations. The *Honda* claims would all have been extinct ten years ago.

Further, as to leg (b), if Carolan and Amram had not successfully prosecuted *Abe* while the *Honda* claimants and their counsel sat on the sidelines, the *Honda* claimants would today hold pieces of paper with an exact value of 1¢ on the dollar, instead of the value they are now receiving of almost 100 times that amount.

Yet the Government contends that only the builders of leg (c) of the tripod should be compensated for the ultimate result, and that the builders of legs (a) and (b) should receive nothing. The Government goes even farther. It proposes that all the balance of the money in its hands, *as to which it has no interest whatever, and as to which the Honda claimants have no interest whatever*, should go to total strangers, the anonymous creditors of the War Claims Fund. Not one penny should go to the builders of legs (a) and (b) of the tripod.

This is the fundamental issue in this case. All the rest is detail and commentary.

Who has the superior equitable interest in the remaining millions of dollars of unclaimed money which the Government now holds as a mere escrow custodian after all the *Honda* claims have been satisfied? Is it the builders of legs (a) and (b), or the anonymous creditors of the War Claims Fund? We fail to find any explanation in the Government's brief to support a decision in favor of the latter.

* * *

2. The Government's extended argument about the "creation of a fund" and the "tolling of the statute of limitations" is basically answered in Section (B) of the argument in our main brief.

We should call the Court's attention to the most recent case of *Fletcher* v. *A. J. Industries, Inc.*, 72 Cal. Rep. 146, decided by the California Court of Appeals on October 2, 1968. The lengthy opinion reviews the authorities, including the federal authorities. It follows the United States Supreme Court in *Sprague* and awards fees based on "substantial benefit", *ignoring completely* the "creation of a fund". Further, it supports an award where an action is compromised as distinguished from being carried through to final adverse judgment.

The Government ignores the most significant fact in the record dealing with the "tolling of the statute". The Government pretends that the *Abe* litigation had nothing to do with *Honda* but was completely independent and unrelated. (See Govt. brief pp 26–28).

Yet the statement of services filed by Messrs. Wirin and Okrand, counsel for the *Honda* claimants, (App. 37–38) says:

> Following the final determination of the Office of Alien Property adverse to the claimants, we, *in order protect our clients*, and, if necessary, all claimants, prepared a draft of a complaint to review the decision for filing in the United States District Court for the District of Columbia. *Upon learning that the office of Mr. Thomas Carolan was going to file a class action to protect his clients*, who we believed constitute a majority of the Yokohoma Bank claimants, *we decided to avoid duplication and therefore not to file the complaint.*" (Emphasis supplied.)

How more clearly can the English language state that the *Honda* claimants, through their counsel, deliberately and voluntarily chose

to *rely upon the Abe litigation for their own protection?* How can the Government, in the face of this categorical statement of the *Honda* counsel, assert that the *Abe* litigation was totally disassociated from the rights of the *Honda* claimants?

On these points the Government finds it necessary to fall back on *Whittier* v. *Emmett* (Govt. Brief p. 26, et seq.). In order to apply the doctrine of that case, the Government must assert that the *Abe* claimants and the *Honda* claimants were basically total strangers to one another, in no way involved in any joint litigation. It must deny that the *Honda* claimants were full parties to the administrative proceedings for eleven years. It must deny that counsel for *Honda* deliberately permitted appellants, as counsel in *Abe*, to prosecute a "test case" for their joint benefit, while they voluntarily and deliberately sat on the sidelines. Finally, the Government must assert that the *Honda* claimants never participated in any part of the Yokohama Specie Bank matter until after the *Abe* litigation was over; and that then, for the first time, they appeared to take advantage of the "new principle of law" as made by counsel in *Abe*.

The trouble with this position is that it is impossible; it denies every word of the record. This case is the antithesis of *Whittier*.

3. The Government's brief (pp. 37–8) repeats the argument, which it lost in the court below, that Mr. Carolan's services were worthless in the administrative proceedings because he did not prove the eligibility of every single *Honda* claimant in those proceedings. There are three simple answers.

First – The position taken by the Government that other and further proceedings were necessary to qualify the *Honda* claimants for payment is directly contrary to the letters sent to the claimants by the Office of Alien Property in 1958, which the Supreme Court found so significant. (386 U.S. at pages 489–493) A sample letter

is attached as an exhibit to the *Honda* complaint (App. 19–23). *These letters set forth no conditions whatever to the payment to the addressees* other than the transmittal of their certificates. Each addressee is told, in categorical form, that the Chief of the Claims Section, *without more*, will unconditionally "recommend your claim for allowance", upon receipt of the certificate.

Second – The Solicitor General in the Supreme Court and Mr. Jaffe, before Judge Jones, conceded this point. (App 28). Judge Jones, in his opinion, affirmatively relied upon this concession. (App. 66).

Mr. Jaffe, in his brief in this Court, now contradicts his concession.

It is hornbook law that counsel, at any stage of litigation, may decide, on behalf of his client, on any strategy, on any position, on any concession, on any judicial admission. And his client is bound by these tactical decisions, particularly if the Court has acted in reliance upon them. See *Oscanyan v. Arms Co.*, 103 U.S. 261, 26 L. ed. 539 (1880); *Cover v. Schwartz*, 133 F.2d 541 (2d Cir., 1942), cert. den. 319 U.S. 748, 63 S. Ct. 1158, 87 L. Ed. 1703 (1943).

This rule applies equally where the United States is a party. *National Labor Relations Board v. Sterling Furniture Co.*, 202 F. 2d 41 (C.A. 9, 1953); *United States v. Continental-American Bank & Trust Co.*, 79 F. Supp. 450 (W.D. La. 1948), affd 175 F 2d 271 C.A. 5, 1949), cert. den. 338 U.S. 870, 70 S. Ct. 146, 94 L. Ed. 146 (1949); *Lenox Clothes Shops v. Com. of Internal Revenue*, 139 F. 2d 56 (C.A. 6, 1943).

Counsel in an appellate court cannot repudiate deliberate "concessions" made by himself as trial counsel in the court below on the basis of which the lower court entered the judgment which is taken

on appeal. Appellate counsel must take the case as it stands on the record made by himself.

Third – The whole point is meaningless in the end. Even if the Government were permitted to repudiate the concession, it would have no effect. Mr. Carolan's *other* services to the *Honda* claimants during the administrative period were invaluable, and justify compensation of themselves.

He extended the time for filing of their claims; he defeated the destructive legislation; he prosecuted their claims before the Hearing Examiner; and he saved their claims from extinction because of failure to prosecute.

* * *

4. The Government brief is manifestly unfair in its assertion (Govt Brief p. 40) that Mr. Carolan will be adequately paid for his eleven years of work at the administrative level for the *Honda* claimants by the fee that he receives from his personal retainer clients. But no claim of any kind is made in these proceedings for compensation from his retainer clients. Mr. Carolan's claim below, and here, is limited *exclusively* to compensation to be paid with respect to the 3,400 *non-retainer* clients whose claims he saved and *who have no retainer agreement of any kind with him.*

His retainer clients will pay him direct. These proceedings are not needed for that purpose. But how will he be compensated for the benefits rendered to the non-retainer clients?

Judge Jones directed that he be compensated for his services during the administrative period to these non-retainer clients. In principle, this is right. But Judge Jones provided a compensation formula which we have conclusively shown to be a travesty. This is discussed in full in Section (A) (1) of the Argument in our main brief.

What is significant is that not one word appears in the Government's brief in response to this analysis of the unfairness of Judge Jones' award to Mr. Carolan.

We do, however, note with pleasure that the Government joins in our critique of Judge Jones' administrative proposals with respect to the division of fees between counsel. (Govt. brief p. 44). This permits us to urge again that all fees awarded should be awarded directly to appellants, placing upon them the obligation to satisfy all proper demands of other attorneys with respect thereto. (See our Main Brief p. 50, Item (4)).

* * *

Appellants therefore respectfully request this Court to reverse the judgment below and to enter an order in their favor as set forth in Section V of the Main Brief.

Respectfully submitted,

Thomas H. Carolan, Esq.

Philip W. Amram, Esq.
Appellants pro se

BARDYL R. TIRANA, ESQ.
Amram, Hahn & Sundlun
700 Colorado Building
Washington, D. C. 20005
Attorney for Appellants